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Presidential Documents

Title 3—

The President

Proclamation 6321 of August 12, 1991

National Senior Citizens Day, 1991

By the President of the United States of America

A Proclamation

Many a poet and philosopher has reverently described it as "the autumn of life," or the rich twilight that eventually follows the glorious day of youth. Today, however, millions of American seniors are changing the way we view old age. Far from fading into the sunset, these men and women are serving as brilliant points of light in their communities. They are serving others through a host of volunteer programs and personal acts of kindness; they are sharing their ample knowledge and experience in the workplace; and they are quietly enriching their families with a wealth of love and wisdom. Across the United States, older Americans are proving that the senior years—like any other season in life—hold great opportunities and rewards of their own.

Today an estimated 42 million Americans are aged 60 and older, and their numbers are growing steadily. The United States Department of Health and Human Services reports that America now has the second largest population of older people in the world. On this occasion, as we gratefully salute our Nation's senior citizens—the majority of whom are healthy and active—we also recognize those older Americans who need special assistance.

Through the United States Administration on Aging, and through the vast network of State and regional agencies on aging, our Nation is working to provide senior citizens with the opportunities and services that they need and deserve. Many of our efforts are designed to assist elderly Americans who do not have a family member to help care for them. We are also working to provide support to older Americans who serve as primary caregivers for an ill or disabled spouse, parent, or other elderly relative. These efforts underscore our respect for older Americans and our determination to ensure that they are able to live with dignity, comfort, and security.

In honor of those who have given so much to succeeding generations, the Congress, by House Joint Resolution 181, has designated August 18, 1991, as "National Senior Citizens Day" and has authorized and requested the President to issue a proclamation in observance of this day.

NOW, THEREFORE, I, GEORGE BUSH, President of the United States of America, do hereby proclaim August 18, 1991, as National Senior Citizens Day. I call on all Americans to observe this day with appropriate programs, ceremonies, and activities in honor of our Nation's senior citizens.

IN WITNESS WHEREOF, I have hereunto set my hand this twelfth day of August, in the year of our Lord nineteen hundred and ninety-one, and of the Independence of the United States of America the two hundred and sixteenth.

George Bush

[FR Doc. 91-19671
Filed 8-13-91; 4:06 pm]
Billing code 3195-01-M

Rules and Regulations

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR 927

[Docket No. FV-91-413 FR]

Expenses and Assessment Rate for Marketing Order Covering Winter Pears Grown in Oregon, Washington, and California

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule authorizes expenditures and establishes an assessment rate under Marketing Order 927 for the 1991–92 fiscal year (July 1–June 30). This action is needed for the Winter Pear Control Committee (committee) to incur operating expenses during the 1991–92 fiscal year and to collect funds during that year to pay those expenses. This will facilitate program operations. Funds to administer this program are derived from assessments on handlers.

EFFECTIVE DATE: July 1, 1991 through June 30, 1992.

FOR FURTHER INFORMATION CONTACT: Patrick Packnett, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2525–S, Washington, DC 20090–6456, telephone 202–475–3862.

SUPPLEMENTARY INFORMATION: This final rule is issued under Marketing Agreement and Marketing Order No. 927 (7 CFR part 927) regulating the handling of winter pears grown in Oregon, Washington, and California. The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act.

This rule has been reviewed by the Department of Agriculture (Department) in accordance with Departmental Regulation 1512–1 and the criteria contained in Executive Order 12291 and had been determined to be a "non-major" rule.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this final rule on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 90 handlers of winter pears under this marketing order, and approximately 1,800 winter pear producers in Washington, Oregon, and California. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of the handlers and producers of winter pears may be classified as small entities.

The winter pear marketing order, administered by the Department, requires that the assessment rate for a particular fiscal year shall apply to all assessable pears handled from the beginning of such year. An annual budget of expenses is prepared by the committee and submitted to the Department for approval. The members of the committee are handlers and producers of winter pears. They are familiar with the committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate appropriate budgets. The budgets are formulated and discussed in public meetings. Thus, all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by the committee is derived by dividing anticipated expenses by expected shipments of pears (in standards boxes or equivalents). Because that rate is applied to actual shipments, it must be established at a rate which will produce sufficient income to pay the committee's expected expenses. Recommended budgets and rates of assessment are usually acted upon by the committee shortly before a session starts, and expenses are incurred on a continuous basis. Therefore, budget and assessment rate approvals must be expedited so that the committee will have funds to pay its expenses.

The committee met on May 31, 1991, and unanimously recommended 1991–92 fiscal year expenditures of $5,130,616 and an assessment rate of $0.38 per standard box, or equivalent, of assessable pears shipped under M.O. 927. In comparison, 1990–91 fiscal year budget expenditures were $4,943,738 and the assessment rate was $0.315.

Major expenditure items this year in comparison to 1990–91 budgeted expenditures (in parentheses) are $4,305,000 ($3,859,775) for paid advertising, $128,176, ($317,767) for contingencies to cover unanticipated expenses, and $246,000 ($350,861) for research designed to improve winter pear yields and quality. The committee has budgeted $145,000 for industry development, of which $100,000 will be held in reserve for use in the event of any consumer related industry crisis. The balance of $45,000 will cover consultant services provided by the Northwest Horticultural Council. The remaining expenses are primarily for program administration and are budgeted at about last year's amounts.

Assessment income for the 1991–92 fiscal year is expected to total $4,674,000 based on shipments of 12,300,000 packed boxes of pears. Other available funds, including $32,408 in prior year assessments, $30,000 in miscellaneous income, and a reserve of $394,208 carried into this fiscal year, will also be utilized to cover 1991–92 fiscal year expenditures. The committee's reserves are within authorized limits.

Notice of this action was published in the July 22, 1991, issue of the **Federal Register** (56 FR 33394). The comment period ended August 1, 1991. No comments were received.

While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments

on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

After consideration of the information and recommendations submitted by the committee, and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

Approval of the level of expenses and assessment rate for the winter pear program should be expedited because the committee needs to have sufficient funds to pay its expenses, which are incurred on a continuous basis. Therefore, it is also found that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** (5 U.S.C. 553).

List of Subjects in 7 CFR Part 927

Marketing agreements, Reporting and recordkeeping requirements, Winter pears.

For the reasons set forth in the preamble, 7 CFR part 927 is amended as follows:

Note: This section will not appear in the annual *Code of Federal Regulations.*

PART 927—WINTER PEARS GROWN IN OREGON, WASHINGTON, AND CALIFORNIA

1. The authority citation for 7 CFR part 927 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674

2. New § 927.231 is added to read as follows:

§ 927.231 Expenses and assessment rate.

Expenses of $5,130,616 by the Winter Pear Control Committee are authorized, and an assessment rate of $0.38 per standard box, or equivalent, of pears is established for the fiscal year ending June 30, 1992. Unexpended funds from the 1991–92 fiscal year may be carried over as a reserve.

Dated: August 9, 1991.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 91–19385 Filed 8–14–91; 8:45 am]

BILLING CODE 3410–02–M

RESOLUTION TRUST CORPORATION

12 CFR Part 1617

RIN 3205–AA08

Minority- and Women-Owned Business Contracting Program

AGENCY: Resolution Trust Corporation.

ACTION: Interim final rule; request for comments.

SUMMARY: The RTC hereby promulgates an interim final rule pursuant to the requirement of section 1216(c) of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). The intent of the program that is the subject of the rule is that RTC identify, promote and certify eligible firms for inclusion in its contracting activities, at the same time assuring that RTC utilization of the services of the private sector is accomplished in a practicable and efficient manner. In order to accomplish this goal of maximizing the inclusion of firms owned by minorities and women, RTC has deemed it appropriate to design a program which will aggressively outreach to minorities and women and firms owned by minorities and women to enable them to participate more fully in RTC contracting activities through the use of joint venture agreements and other devices.

As well as covering contracting in general, the rule governs the identification, promotion, and certification of eligible minority- and women-owned law firms for inclusion in the RTC legal services contracting process.

This interim final rule is solely concerned with the outreach portion of the RTC's program, that is, to ensure maximum participation by minority- and women-owned businesses in the competitive process for RTC contracts. It does not address the use of bonuses, preferences, or other devices used in the process of evaluating offers to perform contracts. In those matters, the RTC will continue to follow current policies and procedures. Comment is sought on those issues, however.

DATES: This interim final rule is effective August 15, 1991.

Comments must be received by October 15, 1991.

ADDRESSES: Written comments regarding the interim final rule should be addressed to John M. Buckley, Jr., Executive Secretary, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434–0001. Comments may be hand delivered to room 314 on business days between 9 a.m. and 5 p.m. Comments may also be inspected in the Public Reading Room, 801 17th Street, NW., between 9 a.m. and 5 p.m. on business days. [Phone number: 202–416–6940; FAX 202–416–4753].

FOR FURTHER INFORMATION CONTACT: On issues relating to non-legal contracting, Dolores Lowery, Director, Office of Minority and Women Owned Business Outreach (Asset and Real Estate Management Division), Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434–0001, 202–416–7389, or Carl Gold, Legal Division, 202–416–7327; on issues relating to contracting with law firms, Mary A. Terrell, Legal Division, Resolution Trust Corporation, 801 17th Street, NW., Washington, DC 20434–0001 (202–416–7328); or David Fisher, Legal Division (202–416–2137). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION:

Background

FIRREA, enacted on August 9, 1989, amended the Federal Home Loan Bank Act (12 U.S.C. 1421, *et seq.*) by adding section 21A, which establishes the Oversight Board and the RTC. Section 21A(b)(11)(A)(ii) provides that, in carrying out the duties of the RTC, the services of independent contractors shall be utilized if deemed practicable and efficient by RTC. FIRREA, at section 1216, 12 U.S.C. 1833e (1990), additionally required RTC to prescribe regulations to establish and oversee a minority and women outreach program to ensure inclusion, to the maximum extent possible, of minorities and women and entities owned by minorities and women in contracting activities of RTC.

On January 30, 1990, the RTC adopted an interim Policy. The interim Policy, which applied only to services other than legal services, was made available for comment, by a notice in the **Federal Register** [55 FR 6570, February 23, 1990]. Seventeen written comments were received.

The interim Policy provided for the establishment of the Minority- and Women-Owned Business outreach program and set out as its mission the identification, promotion and certification of appropriate entities for inclusion in RTC contracting activities. Further, the Policy provided for the addition of bonus points equal to ten percent (10%) of the total available technical points in establishing the technical score of an offer submitted by a minority- or women-owned firm. Additionally, a cost proposal submitted by such a firm would be deemed the low

cost proposal in the event that the cost proposal submitted by the minority- or women-owned firm was not more than three percent (3%) greater than the low cost proposal.

RTC was to monitor the incremental cost of utilizing this bonus and was to limit the cost to $2,000,000 per year. The cost bonus was to be available for a period of three years.

General Comments

In general, the commenters suggested various changes in the program in order to improve contracting opportunities for businesses owned by women and minorities, particularly in creating joint venture opportunities. Some commenters sought a specific requirement for the participation of these businesses, such as the use of set asides.

Commenters recommended the restructuring of asset portfolios into smaller sizes to facilitate the ability of smaller firms to effectively compete. Some commenters suggested RTC develop portfolios for direct award to minority- and women-owned businesses ("MWOBs"). It was suggested that RTC develop targets for MWOB contracting equal to the percentage of MWOBs in the RTC contractor database. Further, it was suggested that RTC utilize this same percentage as a goal for assets to be managed by MWOB firms.

Other comments included suggestions to increase the staff and budget of the program and to increase the accountability of program staff for the success of the program. Some commenters felt it important that RTC "lead by example" and develop a similar program to ensure its internal staff constitutes a diversified work force.

Finally, commenters offered suggestions to expand the program to ensure compliance on the part of non-MWOB firms with equal employment opportunity laws and to publicize the list of firms eligible for the technical and cost bonuses. This publicity efforts, it was suggested, would enhance opportunities for joint ventures.

On July 17, 1991, a meeting was held at which a preliminary draft of this interim final regulation was discussed. Attendees at the meeting included representatives of the RTC, Congress, and groups representing the interests of minority contractors. A copy of the draft that was discussed, and a synopsis of the issues that were discussed, will be available for public inspection and comment with the comments that are received in response to this interim final regulation. As a result of this meeting, the following sections of the draft regulation were modified as follows:

Section 1617.21(b): Offerors who document and certify that at least 25 percent of the work generated by a contract, with proportionate distribution of fees, will go to MWOB subcontractors, will be eligible for treatment as joint venturers.

Section 1617.31(c): Among other criteria, each proposal submitted in response to an RTC contract solicitation will be evaluated on the contractor's plan for utilization of MWOB firms as subcontractors.

Basis for the Interim Final Regulation

In adopting this interim final • regulation, the RTC is relying on the direction given to it by the RTC's Oversight Board that led to adoption of the interim Policy; the comments that were received in response to publication of the interim Policy; its experience in more than one year of having operated under the interim Policy; the feedback it has received from participants in its existing outreach program; and the directions it has received from Congress in the recent RTC Funding Act of 1991. The RTC intends to utilize the comments that it receives in this proceeding, and its hands-on experience, to continue to extend its outreach efforts under this regulation.

Limited Scope of Rulemaking; Issue on Which Comment Is Sought

Cost and Technical Bonuses and Other Possible Preferential Means of Awarding Contracts

The RTC, after consultation with its Oversight Board, has determined that it is necessary to conduct a further review of cost and technical bonuses prior to taking further regulatory action on these issues. The RTC is conducting this review, including a thorough exploration of the legal ramifications of awarding bonuses as well as the possible use of other means for increasing the number of contracts awarded to minority- and/or women-owned contractors. It is emphasized that the interim final regulation that is being adopted herein is not intended to govern RTC's procedures regarding preferences in the evaluation of contract proposals by MWOB firms. Pending its further review, the RTC will follow existing policies and procedures regarding the evaluation of contract offers and awards of other contracts, which include the use of bonuses and preferences. The interim final regulation deals only with expanding and strengthening the RTC's outreach program. It does not revoke the RTC's practice of awarding preferences to offers by MWOB firms. To avoid public confusion, the RTC is separately adopting and making publicly available, through its Public Reading Room in Washington, DC, and through its Regional Service Centers, a directive that will replace the Policy Statement as the document governing evaluation of MWOB contract proposals. The RTC also intends to augment its Contractor Selection and Engagement directive, which is also publicly available, regarding the implementation of the MWOB contracting program.

The RTC will incorporate in its regulations, cost or technical bonus provisions, or other measures to increase the number of contracts awarded to MWOB firms, only after a further, separate regulatory action. The RTC hereby solicits and encourages comments on all issues regarding the costs and benefits and legal ramifications of awarding cost or technical bonuses. The RTC further solicits, for the purposes of further review, comments on the use of other methods to increase the number of contracts awarded to MWOB firms. Such methods could include awarding, on a non-competitive ("sole source") basis, contracts of a certain type or size to minority- and/or women-owned firms; soliciting competitive offers to perform certain contracts only from minority- and/or women-owned firms; or soliciting equal proportions of minority-owned firms, women-owned firms, and "majority" firms for particular contracts or categories of contracts.

Comments Received in Response to the Interim Policy Regarding Bonuses and Other Devices for Increasing the Number of Contracts Awarded to MWOB Firms

The provision of the program which generated the most comments was the $2,000,000 per year limitation on the cost proposal differential. Virtually all who commented on this limitation disagreed with it. Nine commenters felt it was too low in view of the size and scope of RTC's contracting program. Some commenters viewed the limitation as evidence of a lack of full commitment to the program by RTC. Others felt that it would discourage minority- and women-owned business (MWOB) participation. Some commenters characterized the limitation as a "token subsidy" granted because of a view that such firms are not competitive. Most commenters sought to eliminate the limitation and to extend the availability of the bonus for the life of RTC's contracting program.

The other issue of concern to several respondents was the extent of the cost

bonus. Commenters suggested increases ranging from five percent to ten percent. The increase was suggested to allow MWOBs to more evenly compete with firms with larger asset bases and greater ability to amortize costs. It was suggested that a ten percent bonus is consistent with the practice of other agencies. One respondent felt unable to determine the utility of the three percent bonus but questioned whether it was adequate to overcome the burdens MWOBs face in gaining access to markets and capital. It was suggested that RTC provide an advance of the first month's fee in order to overcome initial cash flow burdens.

Joint Ventures

The comments to the interim Policy raised substantial concern about RTC's joint venture contracting program: When could they be formed and what constituted an adequate percentage of MWOB participation. At the time of the adoption of the Policy, RTC required that a joint venture be fully consummated, have a unique Taxpayer Identification Number ("TIN"), and be registered in the contractor database. Most commenters felt that requiring the establishment of joint ventures in advance of an actual requirement did not allow for the joining of firms with the "best" mix of skills. Some commenters suggested that RTC seek to involve minority- or women-owned firms as subcontractors or co-venturers with winning bidders. This would seemingly ensure the availability of not only experience and capacity but also participation for MWOB firms. Commenters suggested that MWOB firms be required to perform from 20 percent to 50 percent of the overall effort in a joint venture and be compensated in proportion to their work requirement.

RTC has modified its procedures for accepting proposals from joint ventures or from contractors which specify in advance that certain duties will be performed by an identified subcontractor. RTC will accept a proposal from a joint venture which includes the firm originally solicited. The firm originally solicited must perform a substantial part of the overall work. The joint venture must have become registered, with a unique TIN, prior to RTC's executing a contract with the joint venture.

Where a joint venture seeks to participate in this Program, at least 25 percent of the duties must be performed by the MWOB firm and the MWOB firm must be compensated proportionately to its duties.

Definitions

The definitions that are adopted in the interim final regulation, in particular "minority," are based on commonly accepted guidelines promulgated by federal agencies. Eligibility is conferred by 51 percent (51%) ownership and control by minorities or women. A "joint venture" requires a minimum of 25 percent (25%) participation by the eligible firm.

Outreach

The RTC has a wide range of needs for services that must be performed by the private sector under service contracts. In carrying out its responsibilities, the RTC will engage minority- and women-owned firms to the fullest extent possible. The identification and registration of such firms are nationwide in scope and are primarily dependent upon efforts of RTC staff charged with this special effort. Moreover, all RTC staff who interface with the contracting community will be knowledgeable of and promote this effort.

Generally, eligible firms will be identified by (a) obtaining various lists and directories of women- and minority-owned firms maintained by other governmental agencies; (b) targeting appropriate firms for participation in the RTC's contractor education effort; and (c) participating in conventions, seminars and professional meetings comprised of or attended by MWOBs.

Another ongoing aspect of the MWOB contracting program will involve its promotion to the minority- and women-owned business community. Promotion is necessary to reinforce RTC's commitment to the program and to establish a presence for RTC among eligible participants.

The field staff will enhance the efforts of the outreach program through their ongoing review of the contractor database, identifying areas in which firms owned by minorities or women are underrepresented. The outreach program will target its efforts in areas where the contractor database indicates MWOBs are underrepresented.

Certification

Firms claiming status as a minority- or women-owned business will be required to provide certification of that status. To preserve the integrity and foster the objectives of the program, RTC must satisfy itself that the ownership, control and day-to-day management requirements of the program are fulfilled.

Accordingly, RTC will implement a certification policy and procedure that is uniform and consistent, and discourages fraudulent representations. Procedures will be established by which RTC will review, evaluate, and approve certification affidavits from minority- and women-owned businesses, prior to any contract award. A copy of such certification affidavit is appended to this document, and comment is sought on the certification affidavit.

Monitoring RTC Performance

Section 401 of the Resolution Trust Corporation Funding Act of 1991 and the Expenditure Principles of the RTC's Strategic Plan require that RTC monitor the implementation of the outreach regulations and provide regular cost and performance reports to the Oversight Board. To this end, efforts to be made will include the following:

1. Field office staff will provide complete and current data regarding RTC contracting activity;
2. Minority Contract Specialists will review and evaluate the reporting and registration databases for the extent of minority- and women-owned business participation and will prepare such reports for the Washington staff;
3. All staff dedicated to this effort will continuously monitor the implementation of RTC procedures, policies and guidelines for compliance with the goals of FIRREA to ensure maximum inclusion of minority- and women-owned firms in the disposition of assets of failed thrift institutions.

The RTC recognizes that the success of this program involves commitment and leadership from senior management. RTC pledges the continuing involvement of all levels of its staff in making this program a success. In order to achieve these objectives, all offices will report the extent of their involvement in the program, including the number of firms participating in the Solicitation of Services (SOS) process and the number of contracts awarded. The appropriate office will prepare reports (as required) for dissemination to management, Congress and the public.

Other Matters on Which Comment is Sought

The RTC is continually exploring and using other available methods of increasing the participation of MWOB firms in matters performed by contractors. As one instance, the RTC has entered into an agreement with the Small Business Administration under which minority firms will perform subcontracts for the RTC as part of the Administration's "section 8(a)" program. The RTC solicits comments on any other similar means by which it may increase

MWOB participation in the performance of RTC contracts.

Issues Relating to Outreach Program for Minority and Women-Owned Law Firms

The above discussion has focused mainly on the RTC's outreach program for contractors providing services other than legal services. The following discussion applies to the RTC's outreach program for hiring law firms owned by minorities and/or women.

The purpose of this rule is to implement the requirements of FIRREA concerning the inclusion of Minority- and Women-Owned law firms ("MWOLFs") in the RTC's legal services contracting.

Issues on which comment is sought: In addition to general comments pertaining to this rule, the RTC solicits and encourages comments on the following:

Definitions

The definitions included in the rule are based on commonly accepted usage of those terms. There may, however, be other definitions of those terms that would better suit the purposes of these regulations.

Outreach

The RTC has a wide range of needs for legal services in areas such as litigation, transactions, professional liability, and environmental law, among others. In carrying out its responsibilities, the RTC Legal Branch (of the Legal Division of the Federal Deposit Insurance Corporation), and private sector contractors (in particular asset managers) who perform services for the RTC, will engage MWOLFs to the fullest extent possible. The identification and registration of such firms are nationwide in scope and are primarily dependent upon efforts of the RTC legal staff charged with this special effort. All RTC staff who interface with the legal services contracting community will, however, be knowledgeable of and promote this effort.

Generally, eligible firms will be identified by (a) obtaining various lists and directories of MWOLFs maintained by other governmental agencies and bar groups; (b) targeting appropriate MWOLFs for participation in the RTC's legal services contracting education effort; and (c) participating in conventions, seminars, and professional meetings comprised of or attended by MWOLFs.

A major purpose of the promotion of the MWOLF outreach endeavor is to reinforce the RTC's commitment to the program and to increase awareness among potential contractors for legal services of the ability to participate in this program.

The RTC Legal Branch regional and field office staffs will enhance the efforts of the outreach program through their regular reporting and ongoing tracking of legal matters referred to outside counsel, identifying areas in which MWOLFs are underrepresented. The outreach program will then target its efforts in areas where the List of Counsel Utilized ("LCU") database indicates MWOLFs are underrepresented.

Referral

The regulation addresses various methods that will be used by the RTC and its private sector contractors to refer legal work to MWOLFs. FIRREA requires that the RTC utilize the services of the private sector to the extent that it is practicable and efficient. Since the RTC does to a large extent rely upon such private sector contractors, and such contractors have significant responsibility regarding the hiring of outside counsel, it is appropriate that those contractors, as well as RTC employees, adhere to the regulation in this regard.

Certification

Law firms claiming status as MWOLFs will be required to provide certification of that status. To preserve the integrity and foster the objectives of the program, RTC Legal must satisfy itself that the ownership requirements of the program are fulfilled.

The RTC will implement a certification policy and procedure for the MWOLF outreach program that is uniform and consistent, and discourages fraudulent representations. Procedures will be established by which the RTC will review, evaluate, and approve certification affidavits from MWOLFs prior to their being placed on the LCU. A copy of the certification affidavit is appended to the rule, and comment is sought on the document.

Monitoring RTC Performance

Section 401 of the Resolution Trust Corporation Funding Act of 1991 (Pub. L. No. 102-18) and the Expenditure Principles of the RTC's Strategic Plan require that the RTC monitor the implementation of the outreach regulations and provide regular cost and performance reports to the Oversight Board and Congress. Accordingly, efforts to be made include:

1. RTC Legal regional and field office staff will provide complete and current data on a regular basis regarding legal services contracting activity.

2. Minority and Women Outreach Coordinators will review and evaluate the reporting and registration databases for the extent of MWOLF participation and will prepare such reports as are necessary for the Washington Legal Branch staff.

3. All RTC staff dedicated to this endeavor will continuously monitor the implementation of RTC procedures, policies, and guidelines for compliance with the goals of FIRREA to ensure maximum inclusion of MWOLFs in the provision of legal services to the RTC by outside counsel.

The RTC recognizes that the success of this program involves commitment and leadership from senior management. The RTC pledges the continuing involvement of all levels of its legal staff in making this Outreach Program a success.

Other Methods of Increasing MWOLF Participation

The RTC is continually exploring and using other available methods of increasing the participation of MWOLFs in outside legal services contracts. The RTC is interested in receiving comments on other means by which MWOLFs might affiliate with non-MWOLFs in order to gain expertise in particularly complex areas of the law while providing legal services to the RTC in a cost effective manner.

Administrative Procedure Act

The RTC is adopting this regulation as an interim final regulation. It will be effective immediately upon publication in the **Federal Register**, without the usual notice-and-comment period or delayed effective date as provided for in the Administrative Procedure Act, 5 U.S.C. 553. These requirements may be waived for "good cause." The RTC notes that the interim final rule is an expansion of the interim Policy that it has operated under for almost one and one-half years. The interim Policy, as noted, was commented on extensively, and the RTC has relied upon those comments, and its experience, in drafting the interim final rule. In addition, promulgation of the regulation on an expedited basis is necessary to enable the RTC to maximize the participation in its contracting activities of minority- and women-owned businesses.

In the recently enacted RTC Funding Act of 1991, Congress exhorted the RTC to redouble its efforts to add minority- and women-owned businesses as contractors. The immediate effectiveness of the regulation is also necessary to avoid public confusion

regarding the RTC's policies and procedures in this area. Such public confusion could delay the RTC's contracting process and cause delays in asset disposition and other activities. The costs of such delays would ultimately be borne by the taxpayer. For these reasons, the RTC finds that the benefits to the public in adopting the interim final rule outweigh any harm from the delay in seeking public comment. The RTC actively solicits further comment and will consider those comments in the adoption of the rule as final, which will take place within 90 days after the close of the public comment period.

Summary

The RTC is adopting these regulations for the Minority- and Women-Owned Business Contracting Program in order to implement the provisions of section 1216 of FIRREA which requires the establishment of a minority- and women-owned business outreach program (including the MWOLF provisions) to ensure effective and efficient use of those business entities to support all contracting activities of the Corporation. The RTC will continue to follow current policies and procedures in regard to preferences and other means of evaluating contract offers that may favor MWOB firms. It is imperative that MWOB enterprises are given fair and equitable opportunities to contract with the Resolution Trust Corporation. Strict conformance to this policy shall be enforced.

Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, the following initial regulatory flexibility analysis is hereby provided:

1. Reasons, objectives, and legal bases underlying the interim final regulations: These elements have been discussed elsewhere in the Supplementary Information. It has been noted that the RTC is statutorily mandated by FIRREA to provide this outreach program for minority- and women-owned firms, including law firms. Therefore, to the extent that the regulation affects small minority- and women-owned firms, it is a direct consequence of that statutory mandate. By promulgating this interim final regulation, the RTC intends to have aggressive outreach to minorities and women and firms owned by minorities and women to enable them to participate more fully in RTC contracting activities.

2. Small entities to which the interim final regulations would apply. This element is discussed elsewhere in the Supplementary Information.

3. Impact of the interim final regulations on small businesses: As of July 29, 1991, a total of 6,183 contracts worth approximately $268 million had been awarded to MWOB firms. This has been done using many of the devices that the interim final regulations would continue or expand upon. The RTC hopes to increase the total number of contracts awarded to MWOB firms and seeks comments as to how this can be better achieved. Projected reporting, recordkeeping and other compliance requirements fall upon the RTC, as described above in the preamble. MWOB firms will need only to certify as to their status prior to contract award. This requirement will entail only the filling out of a certification form and will not require the use of professional skills for the preparation of special reports or records. The RTC seeks comments on alternative methods of compliance, or reporting requirements.

The RTC expects to increase the volume of legal services performed by MWOLFs and seeks comments as to how best to achieve this goal. Projected reporting, recordkeeping, and other compliance requirements fall upon the RTC, as described above in the preamble. MWOLFs will need only to certify as to their status prior to placement on the LCU, a requirement entailing only the completion of a certification form. The RTC seeks comments on alternative methods of compliance or reporting requirements.

4. Overlapping or conflicting federal rules. There are no known federal rules which overlap, duplicate, or conflict with the interim final regulations.

5. Alternatives to the interim final regulations. The RTC has not identified alternatives that would be less burdensome to small businesses and yet effectively accomplish the objectives of the interim final regulation. The RTC has made every attempt to bear the administrative burdens rather than shifting them to prospective contractors. However, comment is specifically solicited on this issue.

List of Subjects in 12 CFR Part 1617

Government contracts, Lawyers, Legal services, Minority businesses, Women.

For the reasons set out in the preamble, the RTC hereby adds part 1617 to title 12, chapter XVI of the Code of Federal Regulations to read as follows:

PART 1617—MINORITY- AND WOMEN-OWNED BUSINESS CONTRACTING PROGRAM

Authority: 12 U.S.C. 1441a(a)(14)(x), 1441a(b)(12), 1833e.

Subpart A—General Provisions

§ 1617.1 Purpose.

(a) Section 1216 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. 1833e, requires the Resolution Trust Corporation ("RTC" or the "Corporation") to prescribe regulations to establish and oversee a minority outreach program to ensure inclusion, to the maximum extent possible, of

minorities and women, and entities owned by minorities and women, including financial institutions, investment banking firms, underwriters, accountants, and providers of legal services, in all contracts entered into by the agency with such persons or entities, public and private, in order to manage the institutions and their assets for which the agency is responsible or to perform such other functions authorized under any law applicable to such agency.

(b) This part details the procedures that the RTC will follow to ensure the inclusion of firms owned by minorities and firms owned by women in RTC's contracting for goods and services in connection with its management of savings and loan institutions placed under RTC control and disposition of their assets.

§ 1617.2 Policy.

It is the policy of the RTC to ensure that firms owned and operated by minorities and firms owned and operated by women have the opportunity to participate, to the maximum extent possible, in all contracting activities of the Corporation. This includes contracting for the procurement of goods and services as well as the contracting activities of conservatorships and receiverships. Every employee of the RTC has the affirmative duty to identify and seek to remove any barrier to the maximum possible participation in the Corporation's contracting activities of firms owned and operated by minorities and by women.

§ 1617.3 Definitions.

The following definitions apply to §§ 1617.1 through 1617.44.

(a) *Joint Venture* means an association of entities and/or individuals, one of which qualifies as an MWOB, formed by written contract to engage in and carry out a specific business venture for which purpose they combine their efforts, resources and skills for joint profit, but not necessarily on a continuing or permanent basis for conducting business generally.

(b) *Management and Daily Business Operations.* In order for minorities or women to be found to control and manage a business concern, the following must exist:

(1) A minority or woman must:

(i) Hold the position of president or chief executive officer; and

(ii) Control the board of directors of the firm; and

(iii) Have directly related managerial or technical experience and competency.

(2) That person must have direct, full-time responsibility for the day-to-day management of the business. To establish such day-to-day management responsibility, all of the following functions must be performed by the minority or woman president or chief executive officer:

(i) Establishment of company policies;

(ii) Determination and selection of business opportunities;

(iii) Supervision and coordination of projects;

(iv) Control of major expenditures;

(v) Hiring and dismissing of key personnel;

(vi) Marketing and sales decisions;

(vii) Signature on major business documents.

(c) *Minority* means any Black American, Asian American, Pacific Islander, Hispanic American, Native American, or Eskimo, who is either a citizen or a permanent resident of the United States.

(1) *Asian American*—A person having origins in any of the original peoples of the Far East, Southeast Asia or the Indian Subcontinent.

(2) *Black American (not of Hispanic origin)*—A person having origins in any of the black racial groups of Africa.

(3) *Eskimo*—A person having origin in the Eskimo or Aleutian peoples.

(4) *Hispanic American*—A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

(5) *Native American*—A person having origins in any of the original peoples of North America.

(6) *Pacific Islander*—A person having origins in any of the nations commonly referred to as the "Pacific Rim Countries," including the Hawaiian Islands.

(d) *Minority-Owned Business* means a business concern that is owned and controlled by one or more members of a minority group.

(e) *MWOB* means minority- and women-owned business.

(f) *Owned and Controlled* means a business:

(1) Which is at least fifty-one percent (51%) unconditionally owned by one or more members of a minority group or by one or more women or, in the case of a publicly-owned business at least 51 percent of each class of voting stock of which is unconditionally owned by one or more members of a minority group or by one or more women, or, in the case of a partnership, at least 51 percent of the partnership interest is unconditionally owned by one or more members of a minority group or by one or more women; and

(2) Whose management and daily business operations are controlled by one or more such individuals.

(g) *Unconditional Ownership* means ownership that is not subject to conditions precedent, conditions subsequent, executory agreements, voting trusts, shareholder agreements, or other similar arrangements which serve to allow the primary benefits of program participation to accrue to entities or individuals other than those upon whom eligibility for this program is based.

(h) *Women-Owned Business* means a business concern that is owned and controlled by one or more women.

§ 1617.4 Scope.

Sections 1617.3 through 1617.44 apply to all contracting activities, with the exception of contracting for legal services, engaged in by RTC, in any of its capacities, for all RTC functions authorized by law. These contracts will typically pertain to services such as asset management, accounting services, appraisals, property management, information systems, property maintenance, surveying, general contracting and subcontracting, architectural/engineering consulting, construction consulting, property tax consulting, title work, financial investigation services, marketing, signage and printing services and related services. Contracting for legal services is governed by §§ 1617.50 through 1617.70.

Subpart B—Outreach

§ 1617.10 Identification of MWOBs.

(a) *General.* The RTC will design a program, nationwide in scope, to identify MWOB entities capable of meeting the contracting needs of the RTC. The program will network with state and local government agencies, private and non-profit organizations and include participation in professional conventions and seminars sponsored and widely attended by minorities and women.

(b) *Specific elements.* The outreach program will:

(1) Develop a promotional campaign to inform the MWOB community of the Corporation's needs and its commitment to involve such firms in its activities;

(2) Advertise workshops in local MWOB media outlets;

(3) Participate in conferences likely to be attended by potential program participants;

(4) Network with state and local agencies devoted to the promotion of women- and minority-owned businesses;

(5) Assist program participants in understanding and meeting the RTC's contracting needs, especially as they will be represented in various Solicitations of Services (SOS);

(6) Support and promote joint ventures, without RTC employees becoming directly involved in the establishment of particular joint ventures or cooperative agreements;

(7) Provide registration materials to firms that have been identified; and

(8) Assure that all RTC staff who interface with the contracting community are knowledgeable of and promote this program.

§ 1617.11 Promotion.

(a) RTC will conduct seminars and workshops within this community. The focus of these encounters will be to provide information regarding the program, its goals and objectives, and companies qualified to participate in the program; facilitate interaction between RTC and this community; and manifest RTC's commitment to doing business with these groups.

(b) Opportunities for MWOBs will be expanded by encouraging both minority- and women-owned firms to form joint venture arrangements and cooperative agreements with majority-owned (i.e. other than minority- or women-owned businesses) firms.

§ 1617.12 Registration.

(a) Once prospective program participants have been identified through the promotional efforts, they will be included in RTC's overall contractor registration effort, which ensures that all potential contractors comply with the RTC's regulations governing ethical responsibilities, conflicts of interest and confidentiality. Assistance in the registration process will be provided as necessary.

(b) Properly registered firms will be entered in RTC's nationwide contractor database, from which all firms are chosen to participate in the competitive procurement process.

(c) Separate fields in the contractor database will be maintained for minority-owned and -operated firms and for women-owned and -operated firms.

§ 1617.13 Certification.

(a) Firms claiming status as a MWOB will be required to provide certification of that status.

(b) RTC will review, evaluate and approve certification affidavits from MWOBs prior to any contract award. The procedure will involve the following:

(1) RTC will send eligible firms selected as offerors a form of certification affidavit to be completed under oath with the solicitations;

(2) RTC will review returned certification documents to assure that the potential participant has qualifying status.

Subpart C—Joint Ventures

§ 1617.20 General.

In an effort to encourage and enhance opportunities for MWOBs to gain access and entry to RTC contracting activities, the Corporation supports and promotes the concept of joint ventures. The intention of this promotion is that through such an effort MWOBs will acquire training through association with a more established or larger firm and will increase resource development opportunities so that MWOB firms may eventually have the expertise and capacity to compete for the Corporation's very largest contract awards.

§ 1617.21 Eligibility.

(a) A joint venture will be eligible for this program if:

(1) Each minority- or women-owned business is responsible for a clearly defined portion of the work to be performed and holds management responsibilities in the joint venture; and

(2) Each minority- or women-owned business must perform at least 25 percent of the duties and be contractually entitled to compensation proportionate to its duties.

(b) In addition to the criteria established in § 1617.3 and in paragraph (a) of this section, a contractor will qualify as a joint venturer if it documents and certifies in its proposal that at least 25 percent of the work required by the contract will be performed by one or more MWOB subcontractors, and that the subcontractors will receive compensation proportionate to their duties.

§ 1617.22 Establishing and registering joint ventures.

A firm receiving a solicitation from RTC may form a qualifying joint venture with one or more other RTC registered firms that may or may not have received the solicitation. Each joint venture which is established before receipt of any SOS, and every joint venture engaged by RTC, must have its own Tax Identification Number and must be separately registered with RTC.

§ 1617.23 Joint venture agreements.

To qualify for this program the joint venture must provide a copy of its written joint venture agreement to RTC at the time it submits a proposal. That agreement must clearly identify the extent of participation for each firm in the joint venture and address, among other matters, the following:

(a) The purpose of the joint venture;

(b) The management structure of the joint venture;

(c) The percentage of RTC funds earned by the joint venture to be distributed to the MWOB concern and the allocation of losses, if any;

(d) All major equipment, facilities, and other resources to be furnished by each participant to the joint venture;

(e) That each party to the joint venture is jointly and severally liable for the liabilities of the joint venture;

(f) That the MWOB joint venture partner will have the opportunity to represent itself, or will otherwise be represented at all RTC meetings, such as bidders conferences, debriefings, contract closings and contract oversight reviews; and

(g) That all parties to the joint venture will fully disclose to one another all solicitations of service (SOS), task order bids, notices of best and final offers, SOS amendments, notice of awards, contracts and any and all other documents necessary or relative to the joint venture. Such disclosures must be made to the minority or women venturers before submission of any proposals, bids or offers for contracts with the RTC.

Subpart D—Subcontracting

§ 1617.30 Policy.

In accordance with RTC's other general requirements for subcontracting activity, the RTC shall satisfy itself that all private sector firms awarded a contract with the RTC will provide the maximum practicable opportunity to minority- and women-owned firms to participate in subcontracting awards.

§ 1617.31 Implementation of policy.

(a) RTC contractors must agree to carry out this "maximum inclusion practicable" policy in a manner consistent with RTC's overall contracting policies and procedures. The contractor shall implement this policy for all contracts where mandatory subcontracting is required.

(b) All RTC contracts shall include the requirement that contractors cooperate in any studies or surveys that the Corporation may undertake to review and monitor the performance of this program.

(c) The RTC's criteria for evaluating contract proposals shall include an evaluation of the offeror's plan to use MWOB firms as subcontractors.

Subpart E—Solicitation and Contract Award Guidelines and Monitoring

§ 1617.40 Inclusion in solicitations.

The nationwide contractor database will display a directory of all eligible MWOB firms. RTC policies and guidelines will ensure to the maximum extent possible that MWOB firms are included in each contract solicitation. This may be achieved by, among other methods, soliciting proposals for asset managers to manage small, homogeneous, geographically concentrated asset pools.

§ 1617.41 Right to award contracts reserved.

RTC reserves the right to award a contract directly to a minority- or women-owned business either by technical competition or by sole source award.

§ 1617.42 Internal education program.

RTC staff time and resources will be devoted to an internal education program to promote the awareness of all RTC staff about MWOB firms and RTC's commitment to their full participation in its activities.

§ 1617.43 Notices under agreements.

In making a contract award, RTC will ensure that the MWOB participant in a joint venture is identified within the agreement as one of the parties to whom notices shall be sent.

§ 1617.44 Monitoring.

In order to achieve the objectives of the MWOB program, all offices in RTC will report the extent of their involvement in the program, including the number of firms participating in the SOS process and the number of contracts awarded. The appropriate office will prepare reports, as required, for dissemination to management, Congress and the public.

Subpart F—General Provisions Applicable to Law Firms

§ 1617.50 Policy and scope.

(a) It is the policy of the RTC to ensure that law firms owned by minorities and women have the opportunity to participate, to the maximum extent possible, in all legal services contracted for by the RTC Legal Branch, including services contracted for the Legal Branch by private sector contractors. Every employee of the RTC has the affirmative duty to identify and seek to remove any barrier to the maximum possible participation by minority- and women-owned law firms, and minorities and women in those law firms, in the RTC's legal services contracting activities.

(b) This policy applies to all contracting for legal services engaged in by the RTC Legal Branch (including contracting by private sector contractors for the Legal Branch), including services provided directly to the Corporation, and services provided to conservatorships and receiverships. It applies to legal services including, but not limited to, litigation, transactions, bankruptcy, bond claims, director and officer liability, and other areas of law specific to the RTC Legal Branch.

§ 1617.51 Definitions.

The following definitions apply for the purposes of §§ 1617.50 through 1617.80.

(a) *List of Counsel Utilized ("LCU").* The list of law firms that are on the RTC contractor database and are eligible to perform legal services for the RTC. Only law firms on the LCU may have legal matters referred to them.

(b) *Minority.* See the definitions of § 1617.3(c) of subpart A of this part.

(c) *Minority-owned firm.* A law firm at least 51 percent owned by one or more members of a minority group, all of whom are attorneys in good standing with a state bar association.

(d) *Minority and Women Outreach Coordinator (MWOC).* A person in each RTC Legal Branch regional and field office designated to serve as liaison with the Washington RTC Legal headquarters office for all matters involving MWOLF legal services contracts.

(e) *MWOLF.* A minority- or women-owned law firm.

(f) *Private sector contractor.* Any person or entity that performs services on behalf of the RTC pursuant to contract, including, but not limited to, an asset manager.

(g) *RTC Legal Branch.* The branch of the Legal Division of the Federal Deposit Insurance Corporation that reports to the General Counsel of the RTC and is dedicated to performing legal services for the RTC.

(h) *Women-owned firm.* A law firm at least 51 percent owned by one or more women, all of whom are attorneys in good standing with a state bar association.

Subpart G—Law Firm Outreach

§ 1617.60 Identification of MWOLFs.

(a) *General.* The RTC will design and implement a program, nationwide in scope, to identify MWOLFs capable of meeting the legal services contracting needs of the RTC. Program personnel will network with state and local bar associations, and other organizations of attorneys, and will participate in professional conventions and seminars sponsored and widely attended by MWOLFs.

(b) *Specific elements.* The identification effort will:

(1) Identify MWOLFs nationwide.

(2) Update firm profiles for all MWOLFs on the LCU.

(3) Conduct firm-by-firm surveys to determine the distribution of matters referred to MWOLFs.

§ 1617.61 Promotion of MWOLFs.

(a) *General.* The RTC will conduct and participate in seminars and workshops for MWOLFs with a focus on providing information on the MWOLF outreach program, its goals and objectives. The RTC will train its employees and private sector contractors regarding the program. Furthermore, RTC employees will participate in seminars and workshops conducted by others regarding relevant topics.

(b) *Specific elements.* The promotional effort will include:

(1) Development of a promotional campaign to inform the legal community, and in particular the women and minority legal community, of the RTC Legal Branch's needs and its commitment to the MWOLF outreach program.

(2) Networking with national, state, and local bar organizations to facilitate interaction between the RTC Legal Branch and MWOLFs.

(3) Expansion of contracting opportunities by encouraging MWOLFs to form joint ventures/co-counsel or other affiliations with nonMWOLFs or other MWOLFs.

(4) Fostering referral of legal matters to MWOLFs by private sector contractors.

(5) Provision of registration materials and guidance to firms that have been identified as MWOLFs.

(6) Ensuring that all RTC staff that interface with the legal services contracting community are knowledgeable of, and adhere to the principles stated in this part.

§ 1617.62 Compliance.

Compliance with this part will be achieved by the designation of individuals as MWOCs in each regional and field office to ensure that the policies and goals of the Program are fulfilled. At the RTC Legal Branch headquarters office, the General Counsel (or designee) will be responsible for the overall implementation of the Program. The objectives of the outreach program will

be made part of those individuals' job descriptions.

§ 1617.63 Registration.

(a) One prospective MWOLF legal services providers have been identified through the promotional efforts, they will be included in the RTC's overall contractor registration effort which is designed to ensure that all potential RTC contractors comply with the RTC's regulations governing ethical responsibilities, conflicts of interest, and confidentiality (12 CFR part 1606). Registration materials will be provided. Assistance with registration will be provided as necessary.

(b) Properly registered MWOLFs will be entered into RTC's nationwide contractor database, from which law firms are selected for inclusion on the List of Counsel Utilized ("LCU"). Separate fields in the contractor database will be maintained for minority-owned and women-owned law firms.

(c) Once registered, MWOLFs will immediately be processed for inclusion on the LCU without regard to whether any legal work is currently available for outside counsel.

§ 1617.64 Certification.

(a) Firms claiming status as MWOLFs will be required to provide certification of that status.

(b) A certification affidavit will be sent to all MWOLFs on the contractor database, to be completed under oath and returned to the RTC Legal Branch.

(c) The RTC Legal Branch will review the certification affidavit to ensure qualifying status.

Subpart H—Law Firm Direct Referral, Joint Venture, and Other Arrangements

§ 1617.70 General.

The RTC's goal is to increase the use of existing expertise and experience possessed by MWOLFs, and to enable MWOLFs to develop expertise in areas that are new to them. The ultimate goal is that each MWOLF achieve self-sufficiency in all matters. These goals will be achieved through direct referral, joint venture/co-counsel referral, or other arrangements.

§ 1617.71 Direct referral.

Direct referral of a legal matter to a MWOLF by an RTC attorney or a private sector contractor will be used when the MWOLF has both the capacity and the experience to handle the matter. It is the MWOC's responsibility to identify MWOLFs with the capacity and experience necessary to handle particular matters, or in the case of headquarters office matters, it is the responsibility of the General Counsel (or designee).

§ 1617.72 Joint venture/co-counsel referral.

(a) A joint venture/co-counsel referral will be used to combine the resources of two or more firms. This arrangement pairs MWOLFs with some experience in the area of referral with other MWOLFs or non-with MWOLFs more experienced in the same area.

(b) The MWOLF must be responsible for a clearly defined portion of the work to be performed, for which the MWOLF must be compensated in proportion to its duties. The goal is that the MWOLF's participation will be at least 25 percent of the work performed.

(c) The RTC Legal Branch will review the joint venture agreement/co-counsel arrangement, which must set forth the degree of participation for each firm, and provide for liability to be maintained by each firm for its share of the work.

§ 1617.73 Subcontracting and other arrangements.

(a) *Subcontract referral.* Legal matters may be referred to a nonMWOLF on condition that the nonMWOLF subcontract out a specified portion of the work, and/or specific tasks, to a MWOLF.

(b) Other forms of affiliation between less experienced MWOLFs and more experienced MWOLFs or nonMWOLFs are available and are encouraged to be utilized for work on a particular matter or for a specified period of time.

(c) All arrangements must be approved by the RTC Legal Branch attorney handling the matter, in coordination with the MWOC, and if necessary, the General Counsel (or designee).

(d) The overriding principle of these arrangements is that work is allocated in such a manner that the less experienced MWOLF receives sound training in the relevant issues while pursuing the matter as cost effectively as possible.

Subpart I—Law Firm Oversight and Monitoring

§ 1617.80 Oversight and monitoring.

Various standardized reports will be prepared by the RTC Legal Branch to indicate, among other things, the total number and type of legal matters referred to MWOLFs, the dollar amounts of fees paid to MWOLFs, a breakdown of various affiliations of MWOLFs with non-MWOLFs, and the local outreach efforts made within regional and field offices, as well as the headquarters office.

By order of the Board of Directors.

Dated at Washington, DC, this 30th day of July, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

Note: Appendices I and II will not appear in the Code of Federal Regulations.

Appendix I

The RTC intends this form to be used for the certification required in § 1617.64. This form is being published here for informational purposes.

Resolution Trust Corporation

Minority/Women-Owned Law Firm Certification Form

Firm Name: ____________________
Street Address: ____________________
P.O. Box: ____________________
City: ____________________
State: ____________________
Zip Code: ____________________
Tax ID Number: ____________________
Phone Number: ____________________
Date Established: ____________________
Fax Number: ____________________

Minority Status

Native American ____
Asian ____
Black ____
Eskimo ____
Hispanic ____
Pacific Islander ____

Women-Owned Status

Yes ____
No ____

Firm Types

Sole Practitioner ____
Partnership ____
Prof. Corporation ____
Joint Venture/Co-Counsel ____
____ % Minority/Women Participation

Firm Ownership

Minority/Women Ownership

801 17th Street, NW., Washington, DC 20434–0001

Certification as to Minority/Women Ownership

The undersigned certifies that the law firm described herein is a minimum of fifty-one (51%) percent minority- and/or women-owned.

For purposes of this program, minority- and women-owned law firms are defined as firms that are at least fifty-one (51%) percent owned by one or more minority/women members, all of whom are members in good standing of a state bar association. In the case of professional corporations, a minority and/or woman individual or minority and/or women group, all of whom are members in

good standing of a state bar association, must own and control at least fifty-one (51%) percent of its voting stock. The term "minority" means any Black American, Hispanic American, Asian American, Native American, Eskimo, or Pacific Islander who is either a citizen or a permanent resident of the United States.

Certification as to Joint Venture/Co-Counsel Status

The undersigned certifies that in the joint venture/co-counsel arrangement described herein the minority/women-owned firm performs a clearly defined portion of the duties, as has been certified on the first page of this certification, and will receive monetary compensation proportional to the work performed.

Penalties for Misrepresentations

Any person or entity who intentionally misrepresents RTC's Minority or Women Owned Business Program eligibility in order to benefit from provisions established under Title XII, Section 1216, of the United States Code shall be subject to appropriate penalties including suspension, exclusion and ineligibility for participation in any program, activity or contract function emanating from the Resolution Trust Corporation. Further, any person knowingly and willfully making false, fictitious, or fraudulent statements or representations may be subject to fines and/ or imprisonment (18 U.S.C. § 1001).

Certification

The preceding information is true, accurate and in compliance with the intent of the United States Code and the Resolution Trust Corporation's Minority and Women Owned Business Program. Further, the Penalties for Misrepresentations section has been read and understood.

Signature: ____________

Name (Printed): ____________

Title: ____________

Firm or Corporation: ____________

Sworn to and Subscribed Before Me, this ___ day of ______ 199__.

____

Notary Public (Signature)

____

Name (Printed)

(Seal)

Address: ____________

____

City, State, Zip

My Commission Expires: ____________

____

For Use of Examining Office

Eligible ___

____

Contract Specialist Date

Ineligible ___

____

MWOC Specialist Date

Appendix II

The RTC intends this form to be used for the certification required in § 1617.13. This form is being published here for informational purposes.

Resolution Trust Corporation

Minority/Woman-Owned Business Certification Form

Business Name: ____________

Street Address: ____________

P.O. Box: ____________

City: ____________

State: ____________

Zip Code: ____________

Tax ID Number: ____________

Phone Number: ____________

Date Established: ____________

Fax Number: ____________

Minority Status:

Native American ___

Asian ___

Black ___

Eskimo ___

Hispanic ___

Pacific Islander ___

Woman-Owned Status

Yes ___

No ___

Business Type

Sole Proprietorship ___

Partnership ___

Corporation ___

Joint Venture ___

___% Minority/Woman Participation

Business Ownership

___% Minority/Woman Ownership

Business Control and Management

As President or Chief Executive Officer with control of the Board of Directors, the Eligible Owner Must Have Direct Full-Time Responsibility for Day to Day Management as Evidenced by:

- Directly Related Managerial or Technical Experience and Competency
- Establishment of Company Policies
- Determination & Selection of Business Opportunities
- Supervision & Coordination of Projects
- Control of Major Expenditures
- Hiring & Dismissing Key Personnel
- Marketing & Sales Decisions
- Signature on Major Business Documents

801 17th Street, NW., Washington, DC 20434-0001

Certification as to Minority/Women Ownership and Control

The undersigned certifies that the business described herein is a minimum of fifty-one (51%) percent Minority and/or Women Owned, is Controlled, and is Managed on a daily basis by a minority or woman.

For purposes of this program, Minority and Women-Owned businesses are defined as firms that are at least fifty-one (51%) percent unconditionally owned, controlled and daily managed by one or more Minority/Women-Owned group (MWOB) members. In the case of publicly owned companies, a Minority/ Women-Owned group must own and control at least fifty-one (51%) percent of its voting stock. The term "Minority" means any Black American, Hispanic American, Asian American, Native American, Eskimo, or Pacific Islander who is either a citizen or a permanent resident of the United States.)

Certification as to Joint Venture Status

The undersigned certifies that in the joint venture described herein the Minority/ Women-Owned business performs at least twenty-five (25%) of the duties and will receive monetary compensation proportional to the work performed.

Joint Ventures with a Minority/Women partner will be eligible for bonus consideration if that partner meets the above criteria. Participation of *less* than twenty-five (25%) percent by the Minority/Women firm does *not* qualify the joint venture for bonus consideration. The joint venture must consist of one or more RTC registered firms. The written joint venture agreement must accompany the submitted proposal, and the agreement must clearly identify the extent of participation for each firm in the joint venture. The Minority/Women-Owned business must be responsible for a clearly defined portion of the work to be performed and must hold management responsibilities in the joint venture. Each joint venture which is established prior to the reception of any SOS must have its own Tax Identification Number, and must be separately registered with the RTC. Firms receiving a solicitation from the RTC may form a qualifying joint venture with one or more other RTC registered firms that may or may not have received the SOS.

Penalties for Misrepresentations

Any person or entity who intentionally misrepresents RTC's Minority or Women Owned Business Program eligibility in order to benefit from provisions established under Title XII, Section 1216, of the United States Code shall be subject to appropriate penalties including suspension, exclusion and ineligibility for participation in any program, activity or contract function emanating from the Resolution Trust Corporation. Further, any person knowingly and willfully making false or fraudulent statements or representations may be subject to fines and/ or imprisonment (18 U.S.C., Section 1001).

Certification

The preceding information is true, accurate and in compliance with the intent of the United States Code and the Resolution Trust Corporation's Minority and Women Owned Business Program. Further, the Penalties for Misrepresentations section has been read and understood.

Signature: ____________

Name (Printed): ____________

Title: ____________

Sworn to and Subscribed Before Me, this ___ day of ______, 199__.

____

Notary Public (Signature)

____

Name (Printed)

(Seal)

Address: ____________

____

City, State, Zip

My Commission Expires: ____________

____

For Use of Examining Office

Eligible ____

Contract Specialist Date

Ineligible ____

MWOB Specialist Date

[FR Doc. 91-19301 Filed 8-14-91; 8:45 am]

BILLING CODE 6714-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 91-ANE-21; Amendment 39-7079]

Airworthiness Directives; E.I. DuPont de Nemours & Co. TSO-C116, Crewmember Protective Breathing, Equipment Model 4566M37B-042N

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule, correction to the final rule.

SUMMARY: This document corrects a clerical error in an Airworthiness Directive (AD) which was published in the Federal Register on Friday, July 26, 1991 (56 FR 34146). This correction adds a compliance time which should have appeared in the first paragraph of the AD. The AD in all other respects remains unchanged.

EFFECTIVE DATE: August 15, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. D. Kramer, (516) 791-6427.

SUPPLEMENTARY INFORMATION: A Final rule Airworthiness Directive (AD), applicable to E. I. DuPont de Nemours & Co. TSO-C116 Crewmember Protective Breathing Equipment (CPBE) Model 4566M37B-042N, was published in the Federal Register on Friday, July 26, 1991, (56 FR 34146). The following correction is needed.

PART 39—[CORRECTED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423, 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Corrected]

2. Section 39.13 is corrected as follows:

On page 34147 in the first column in section 39.13, Airworthiness Directive 91-ANE-21, in the first full paragraph after the compliance paragraph, add the following: "within 45 days after the effective date of this AD".

Issued in Washington, DC, on August 9, 1991.

M.C. Beard,

Director, Aircraft Certification Service.

[FR Doc. 91-19440 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

15 CFR Parts 771, 773, 776, 778, 779, and 799

[Docket No. 910518-1189]

Imposition and Expansion of Foreign Policy Controls

AGENCY: Bureau of Export Administration, Commerce.

ACTION: Interim rule with request for public comment.

SUMMARY: The Department of Commerce is amending the Export Administration Regulations (EAR) in support of U.S. non-proliferation policies. This interim rule imposes foreign policy controls on certain exports by providing authority to deny items that already require a validated license under the EAR, for any reason other than short supply, where the export could be destined for the design, development, production, or use of missiles or chemical or biological weapons, or for a facility engaged in such activities.

This rule also imposes foreign policy controls on exports to specified destinations when the exporter knows that the commodities, technical data, or software will be used in the design, development, production or use of missiles or of chemical or biological weapons, or are destined for such activities, or to any destination when the exporter is informed by the Bureau of Export Administration (BXA), that a validated license is required due to an unacceptable risk of weapons-related use.

In addition, this rule imposes foreign policy controls on exports to specified destinations when a U.S. person knows that the commodities, technical data, or software will be used in the design, development, production, or use of missiles or chemical or biological weapons, or are destined for such activities, or to any destination when the U.S. person is informed by BXA that a validated license is required due to an unacceptable risk of weapons-related use. Neither may a U.S. person, without a validated license, perform any contract, service, or employment knowing that it assists such activities.

The restrictions that apply when an exporter or U.S. person "knows" are tied to certain listed destinations. For chemical or biological weapons, such destinations already are listed in Supplement No. 5 to part 778. This rule adds Supplement No. 6 to part 778, which will list missile projects when the list is made final. Accordingly, the provisions of sections 771.2(c)(13)(i), 778.7(c)(1), and 778.9(a)(1) and (b)(1) will not be applicable until Supplement No. 6 is revised to include such projects.

This rule also imposes foreign policy controls on participation and support by U.S. persons in the design, development, production, or use of missiles or of chemical or biological weapons.

This rule restricts participation by U.S. persons in construction of whole plants to produce chemical weapon precursors in certain countries.

This rule also makes changes in the organization of regulations relating to weapons proliferation, grouping them in newly designated part 778, Proliferation Controls.

DATES: This rule is effective August 15, 1991. Comments must be received by September 16, 1991.

ADDRESSES: Written comments (six copies) should be sent to: Patricia Muldonian, Office of Technology and Policy Analysis, Bureau of Export Administration, Department of Commerce, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Kathryn Sullivan, Bureau of Export Administration, Telephone: (202) 377-8760.

SUPPLEMENTARY INFORMATION:

Background

On March 13, 1991, (56 FR 10765) the Bureau of Export Administration published a proposed rule in the Federal Register that expanded foreign policy controls in several ways in support of U.S. nonproliferation policies. The changes proposed by that rule addressed some of the measures called for in President Bush's December 13, 1990, decision on the Enhanced Proliferation Control Initiative (EPCI) and included in Executive Order 12735 of November 16, 1990, on chemical and biological weapons proliferation. This interim rule implements many of the changes proposed in the March 13, 1991, proposed rule. These changes have been made after consultation with the Department of State and other agencies, and after full consideration of the more than seventy-five public comments received on the proposed rule.

This interim rule expands foreign policy controls in several ways in

support of U.S. nonproliferation policies. The rule provides BXA with authority to deny a license for exports of items that already require a validated license under the EAR, for any reason other than short supply, where the export could be destined for the design, development, production, or use of missiles or chemical or biological weapons, or for a facility engaged in such activities.

The interim rule also imposes foreign policy controls on exports to specified regions, countries, and destinations when the exporter knows the export will be used in the design, development, production, stockpiling, or use of missiles or of chemical or biological weapons, or is destined for a listed project. Supplement No. 5 to part 788 already lists destinations of concern for chemical and biological reasons. This rule adds Supplement No. 6 to part 778 of the EAR, which will list missile projects when such list is made final.

The rules does not provide a definition of the term "know". The background information section of the proposed rule contained a definition of "know", but only two public comments on the rule supported that definition. Ten commenters found the proposed definition too vague and preferred leaving the term undefined. This interim rule adopts that approach and does not contain a definition of "know". At this time, the Department believes that existing case law and judicial interpretation provide adequate guidance to exporters.

Six commenters supported applying the same "know" standard regardless of whether items are subject to nuclear nonproliferation controls or to foreign policy controls on missile systems or chemical and biological weapons. The standard in the nuclear controls is not being changed at this time.

In addition, this interim rule amends the EAR to make clear that BXA may inform an exporter at any time that a validated license is required for a specific export or reexport transaction or for exports or reexports to a specific end-user or end-use because of an unacceptable risk that such shipments will be used in sensitive nuclear activities, in the design, development, production, stockpiling, or use of chemical or biological weapons, or in the design, development, production or use of missiles. An exporter or reexporter may be individually informed by BXA, or notice may be published in the **Federal Register**.

Eight commenters supported the addition of supplements to identify specific facilities or entities involved in missile technology or chemical and biological weapons activities. At this time, such lists are still under consideration.

Like the proposed rule, this interim rule substitutes the term "missiles" for the phrase "missiles capable of delivering nuclear weapons". The definition of such missiles, as contained in the EAR, is not affected by this change.

In addition, this interim rule adds a new provision of the EAR to restrict participation by U.S. persons in missile, chemical weapons, or biological weapons development. No U.S. person may knowingly export or reexport to specified destinations commodities, software, or technical data, regardless of origin, or use in the design, development, production, stockpiling, or use of chemical or biological weapons, or of missiles. Nor may a U.S. person, without a validated license, perform any contract, service, or employment knowing that it assists such activities. When a U.S. person has been informed by BXA, these prohibitions apply to any destination. In addition, the rule restricts participation and support by U.S. persons in the design, construction, or export of whole plants to make precursors for chemical weapons. This prohibition also extends to support of any such transactions, through financing, freight forwarding, or other comparable activities. The term "U.S. person" is defined for the purposes of these provisions to include foreign branches of companies organized in the United States.

Five commenters, addressing the controls on activities of U.S. persons, recommended that these controls should not apply to branches of U.S. companies located in a foreign country. Another commenter suggested revising the U.S. person requirement to exempt transactions involving foreign-made products. Two commenters felt that controls on U.S. persons should be dropped entirely. While the Department has considered these comments, this interim rule makes no changes to the provisions contained in the proposed rule.

The comments received on the proposed rule contained a number of suggestions about how to minimize shipping delays and other problems that could result from the expansion of validated licensing requirements. Six commenters supported the creation of a de minimis exemption from validated licensing requirements for certain activities, such as research and development, quality checks, and small quantities of chemical precursors needed for testing. This suggestion is in line with a public comment on an interim rule that was published on December 20, 1989 (54 FR 52017). That commenters suggested that BXA establish a General License GLV dollar value limit for chemicals controlled under ECCN 4798B. The commenter noted that it is often necessary to ship chemical samples of short notice to prospective foreign customers and that these chemicals are of no practical use for chemical weapons production unless they are obtained in large quantities. BXA, in consultation with the Chemical Manufacturer's Association, determined that a volume limit on samples would be more appropriate. This interim rule adopts the latter approach and revises ECCN 4798B to authorize exports of sample shipments not to exceed one 55 gallon container (209 liters) per chemical to the same consignee in one calendar year. These shipments are authorized under General License G–DEST (§ 771.3 of the EAR) to all destinations except Iran, Iraq, Syria, and Country Groups S and Z, unless the exporter knows or is informed that the export will be used in the design, development, production, stockpiling, or use of chemical or biological weapons.

Two commenters proposed that an additional exemption from validated licensing requirements be created for certain mixtures and compounds containing precursor chemicals (regardless of the percentage of controlled content) that are determined not to be of proliferation concern. This interim rule permits exports under General License G–DEST of chemical compounds created using controlled precursors, provided that the compounds, themselves, are not controlled precursors. However, this rule does not permit exports under General License G–DEST of chemical mixtures that contain controlled precursors except when the precursor chemical is merely an impurity that was not intentionally added.

Nineteen commenters recommended that BXA establish a new general license or special license that would permit exports to affiliates or licensees of U.S. companies. This suggestion is being addressed in a separate rule that creates a special licensing procedure for exports of chemicals and chemical and biological equipment to subsidiaries or other affiliates under the effective control of a U.S. exporter.

Twenty-three commenters criticized the fact that the proposed rule contained unilateral export controls. They felt that the costs and delays of the licensing process would hurt the competitiveness of U.S. companies vis-a-vis foreign producers and that the unilateral

controls would prove ineffective due to the widespread foreign availability of the controlled items. Fourteen commenters argued that foreign availability makes the imposition of multilateral controls the only realistic approach. Three of these commenters suggested that a deadline be established for the creation of multilateral controls and that failure to meet the deadline should result in the termination of unilateral controls. The Department is sensitive to the arguments against unilateral controls and intends to reevaluate these controls annually. Among the factors that will be considered in deciding whether to maintain these controls will be whether comparable controls have been adopted multilaterally.

The proposed rule indicated that while contract sanctity was being provided in the proposal consistent with section 6(m) of the Export Administration Act of 1979, as amended (EAA), serious consideration was being given to eliminating these contract sanctity provisions when the interim rule was published. Twenty commenters expressed strong support for retaining contract sanctity provisions, citing the need for U.S. companies to be viewed as reliable suppliers. Under this interim rule, contract sanctity as a principle is maintained. However, cases may arise in which contract sanctity is inappropriate in light of the serious concerns raised by missiles and chemical and biological weapons. Examples include cases in which an affected contract relates directly, immediately, and significantly to actual or imminent activities involving missile systems or chemical and biological weapons. Accordingly, there will not be a presumption of approval for license applications involving pre-existing contracts. Rather, the existence of a pre-existing contract will be treated as a factor to be considered in reviewing license applications.

Consistent with the prohibitions on trade with Iraq contained in the Executive Orders issued on August 2 and 9, 1990, exporters should obtain guidance from the U.S. Department of Treasury, Office of Foreign Assets Control concerning any export or reexport to Iraq.

On March 7, 1991, the Department submitted a report notifying the Congress of its intent to impose these controls.

Rulemaking Requirements and Invitation to Comment

1. This rule is consistent with Executive Order 12291 and 12661.

2. This rule involves a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). Affected OMB controlled collection actions include 0694–0005, 0694–0007, and 0694–0010.

3. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553), or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

5. The provisions of the Administrative Procedure Act, 5 U.S.C., requiring notice of proposed rulemaking, the opportunity for public participation, and a delay in effective date, are inapplicable because this regulation involves a foreign and military affairs function of the United States. The Secretary of Commerce has submitted a report to Congress on the need for these controls. No other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

However, because of the importance of the issues raised by these regulations, this rule is being issued as an interim rule and comments will be considered in the development of final regulations. Accordingly, the Department encourages interested persons who wish to comment to do so at the earliest possible time to permit the fullest consideration of their views.

The period for submission of comments will close September 16, 1991. The Department will consider all comments received before the close of the comment period in developing final regulations. Comments received after the end of the comment period will be considered if possible, but their consideration cannot be assured. The Department will not accept public comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and will not consider them in the development of final regulations. All public comments on these regulations will be a matter of public record and will be available for public inspection and copying. In the interest of accuracy and completeness, the Department requires comments in written form. Oral comments must be followed by written memoranda, which will also be a matter of public record and will be available for public review and copying. Communications from agencies of the United States Government or foreign governments will not be made available for public inspection.

The public record concerning these regulations will be maintained in the Bureau of Export Administration Freedom of Information Records Inspection Facility, room 4518, Department of Commerce, 14th Street and Pennsylvania Avenue, NW., Washington, DC 20230. Records in this facility, including written public comments and memoranda summarizing the substance of oral communications, may be inspected and copied in accordance with regulations published in part 4 of title 15 of the Code of Federal Regulations. Information about the inspection and copying of records at the facility may be obtained from Margaret Cornejo, Bureau of Export Administration Freedom of Information Officer, at the above address or by calling (202) 377–2593.

List of Subjects

15 CFR Parts 771, 773, 776, and 799

Exports, Reporting and recordkeeping requirements.

15 CFR Part 778

Nuclear energy, Reporting and recordkeeping requirements.

15 CFR Part 779

Computer technology, Exports, Reporting and recordkeeping requirements, Science and technology.

Accordingly, parts 771, 773, 776, 778, 779, and 799 of the Export Administration Regulations (15 CFR parts 730–799) are amended as follows:

1. The authority citations for parts 771 and 776 are revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Executive Order 12214 of May 2, 1980 (45 FR 29783, May 6, 1980); Executive Order 12730 of September 30, 1990 (55 FR 40373, October 2, 1990); Executive Order 12735 of November 16 1990 (55 FR 48587, November 20, 1990).

2. The authority citation for parts 773, 779, and 799 is amended to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended; Pub. L. 95–223, of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12214 of May 2, 1980 (45 FR 29783, May 6, 1980); E.O. 12730 of September 30, 1990 (55 FR 40373, October 2, 1990); E.O.

12735 of November 16, 1990 (55 FR 48587, November 20, 1990).

3. The authority citation for part 778 is revised to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended; Pub. L. 95–223, 91 Stat. 1626 (50 U.S.C. 1701 *et seq.*); Pub. L. 95–242, 92 Stat. 141 (42 U.S.C. 2139(a)); Executive Order 12214 of May 2, 1980 (45 FR 29783, May 6, 1980); Executive Order 12730 of September 30, 1990 (55 FR 40373, October 2, 1990); and Executive Order 12735 of November 16, 1990 (55 FR 48587, November 20, 1990).

PART 771—[AMENDED]

4. Section 771.2 is amended by revising paragraph (c) introductory text; by adding a new paragraph (c)(13); and by adding a new paragraph (c)(14) to read as follows:

§ 771.2 General provisions.

* * * * *

(c) *Prohibited shipments.* No general license, except General License GTDA (and G–DEST as it applies to ECCN 7599I and 7999I), may be used to effect an export to any destination if:

* * * * *

(13) The exporter either:

(i) Knows that the commodity, software or technical data:

(A) Are destined for any project listed in Supplement No. 6 to part 778 of this subchapter; or

(B) Will be used in the design, development, production, or use of missiles in or by a country where a project listed in Supplement No. 6 to part 778 of this subchapter is located; or

(ii) Is informed by BXA that a validated license is required for export to a consignee, wherever located, because the export may apply to the design, development, production, or use of missiles;

(14) The exporter either:

(i) Knows that the commodity, software or technical data will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Supplement No. 5 to part 778 of this subchapter; or

(ii) Is informed by BXA that a validated license is required for export to a consignee, wherever located, because the export may apply to the design, development, production, stockpiling, or use of chemical or biological weapons.

* * * * *

PART 773—[AMENDED]

§ 773.2 [Amended]

5. Section 773.2, paragraph (b)(6) is amended by revising the phrase "§ 776.18" to read "§ 778.7(a)(1)".

§ 773.3 [Amended]

6. Section 773.3, paragraph (b)(1)(iv) is amended by revising the phrase "§ 776.18" to read "§ 778.7(a)(1)".

§ 773.7 [Amended]

7. Section 773.7, paragraph (b)(5) is amended by revising the phrase "§ 776.18" to read "§ 778.7(a)(1)".

PART 776—[AMENDED]

8. Part 776 is amended by removing sections 776.18 and 776.19.

9. The heading to part 778 is revised to read as follows:

PART 778—PROLIFERATION CONTROLS

10. Section 778.1 is revised to read as follows:

§ 778.1 Purpose.

(a) *Scope.* This part defines the types of transactions that are governed by the U.S. policy concerning the non-proliferation of chemical and biological weapons, nuclear weapons or explosive devices, missiles systems and the U.S. maritime nuclear propulsion policy. The controls implement policies set out in sections 3(2)(A) and (B) of the Export Administration Act (50 U.S.C. app. 2401–2420) and section 309(c) of the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 3201–3282; 42 U.S.C. 2011–2160(a)), that is:

(1) To exercise the necessary vigilance from the standpoint of their significance to the national security of the United States;

(2) To further significantly the foreign policy of the United States or to fulfill its international responsibilities; and

(3) To maintain controls over items because of their potential significance for nuclear explosive purposes.

(b) *Related legislation.* These controls supplement those exercised by the Nuclear Regulatory Commission and the Department of Energy under the Atomic Energy Act of 1954 (42 U.S.C. 2011–2296), as amended by the Nuclear Non-Proliferation Act of 1978 (22 U.S.C. 3201–3282; 42 U.S.C. 2011–2160(a)) and other statutes, and by the Office of Defense Trade Controls, Department of State, under the Arms Export Control Act of 1976 (22 U.S.C. 2751–2797c). (See § 770.10 of this subchapter.)

§ 778.2 [Amended]

11. In § 778.2, paragraph (a) is amended by removing the last two sentences.

12. Section 778.3 is amended by adding two new sentences at the end of the introductory text to read as follows:

§ 778.3 Additional validated license requirements for exports with certain nuclear end-uses.

* * * When BXA determines that there is an unacceptable risk of use in or diversion to such activities, it may inform the exporter, either individually or through amendment to the regulations in this subchapter, that an individual validated license is required. However, the absence of any such notification does not excuse the exporter from compliance with the validated license requirements of this section.

* * * * *

13. A new § 778.6 is added to read as follows:

§ 778.6 Preparing nuclear-related application.

An application for a license to export commodities or technical data subject to provisions of § 778.2, § 778.3, or § 778.5 shall be prepared and submitted on Form BXA–622P, Application for Export License, in accordance with instructions set forth in §§ 772.5 and 779.5(e) of this subchapter with the following additional instructions:

(a) *Identification of License Application.* Enter the words "NUCLEAR CONTROLS" in Item 4, "Special Purpose," of Form BXA–622P.

(b) *Consignee in country of ultimate destination.* If the consignee in the country of ultimate destination is not the end-user of the commodities give the name and address of the end-user in item 12, "Special End-Use," or on an attachment to the application, and if known, the specific geographic locations of any installations, establishments, or sites at which the commodities will be used.

(c) *Commodity description.* (1) If the CCL entry in question is divided into sub-entries, indicate the specific sub-entry that describes the commodity. In addition, specifications or descriptive brochures should be provided when available.

(2) If applicable, include a description of any specific features of design or specific modifications that make the commodity capable to the uses described in § 778.3.

(d) *End-use.* (1) A vague or general end-use description will delay review of an application. Applications indicating resale as the end-use sometimes must be

returned without action in order to obtain more information.

(2) When submitting an application under § 778.3, fully explain the basis for the knowledge or belief that the commodities are intended for the purpose(s) described therein. Additionally, indicate, if possible, the specific end-use(s) the commodities will have in the designing, developing, fabricating, or testing nuclear weapons or nuclear explosive devices or in the designing, constructing, fabricating, or operating the facilities described in § 778.3.

14. Sections 778.7 and 778.8 are revised to read as follows:

§ 778.7 Equipment and related technical data used in the design, development, production, or use of missiles.

(a) *Validated license requirements.* In support of U.S. foreign policy to limit the proliferation of missiles, an individual validated license is required to export certain commodities, software, and technical data related to the design, development, production, or use of such missiles to Country Groups QSTVWYZ.

(1) *Commodities subject to weapons delivery systems controls.* The commodities that require a validated license because they are subject to foreign policy controls on weapons delivery systems appear within ECCNs 2018A, 2118A, 4118B, 4131B, 4133B, 4302B, 1357A, 1361A, 1362A, 1385A, 1460A, 1485A, 1501A, 4518B, 1531A, 1548A, 1561A, 1564A, 1565A, 1568A, 4568B, 1595A, 1733A, 1746A, and 1763A. Exporters should consult the Reason for Control paragraph in each ECCN to determine the specific items subject to there foreign policy controls.

(2) *Technical data and software subject to weapons delivery systems controls.* Technical data and software that require a validated license because they are subject to foreign policy controls on nuclear weapons delivery systems are listed in paragraph (4) of Supplement No. 4 to part 779 of this subchapter.

(3) *Definition.* The term "missiles" is defined as rocket systems (including ballistic missile systems, space launch vehicles, and sounding rockets) and unmanned air vehicle systems (including cruise missile systems, target drones, and reconnaissance drones) capable of delivering at least 500 kilograms (kg) payload to a range of at least 300 kilometers (km).

(b) *Controls on other commodities, technical data, and software.* BXA will review license applications, in accordance with the licensing policy described in paragraph (d) of this section, for commodities, technical data, or software not described in paragraph (a) of this section that:

(1) Require a validated license for reasons other than short supply; and

(2) Could be destined for the design, development, production, or use of missiles, or for a facility engaged in such activities.

(c) *Additional validated license requirements based on end-uses related to the design, development, production, or use of missiles.* (1) In addition to the validated license requirements described in paragraphs (a) and (b) of this section, a validated license is required to export any commodity, software, or technical data (excluding technical data exportable under the provisions of General License GTDA and commodities identified in ECCN 7599I or 7999I), when the exporter knows that the commodities, software, or technical data:

(i) Are destined for a project listed in Supplement No. 6 to this part 778; or

(ii) Will be used in the design, development, production or use of missiles in or by a country where a project listed in Supplement No. 6 to this part 778 is located, whether or not that use involves a listed project.

(2) BXA may inform the exporter, either individually or through amendment to these regulations, that an individual validated license is required because there is an unacceptable risk of use in or diversion to such activities, anywhere in the world. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse the exporter from compliance with the validated license requirements of paragraph (c)(1) of this section. An illustrative list of projects is included in Supplement No. 6 to this part 778. Exporters are deemed to have been informed that an individual validated license is required to export to these projects. Exporters should be aware that the list of projects in Supplement No. 6 to this part 778 is not comprehensive; extra caution should be exercised when making any shipments to a country mentioned in Supplement No. 6 to this part 778.

(d) *Licensing policy.* (1) Applications to export the commodities will be considered on a case-by-case basis to determine whether the export would make a material contribution to the proliferation of missiles. When an export is deemed to make such a contribution, the license will be denied.

(2) The following factors are among those that will be considered to determine what action should be taken on individual applications:

(i) The specific nature of the end-use;

(ii) The significance of the export in terms of its contribution to the design, development, production, or use of missiles;

(iii) The capabilities and objectives of the missile and space programs of the recipient country;

(iv) The non-proliferation credentials of the importing country;

(v) The types of assurances or guarantees against design, development, production or use, of missiles delivery purposes that are given in a particular case; and

(vi) The existence of a pre-existing contract.

(3) The following contract sanctity dates have been established:

(i) License applications involving contracts for batch mixers specified in ECCN 4118B that were entered into prior to January 19, 1990, will be considered on a case-by-case basis.

(ii) License applications subject to paragraph (b) or (c) of this section that involve a contract entered into prior to March 7, 1991, will be considered on a case-by-case basis.

(iii) Applicants who wish a pre-existing contract to be considered in reviewing their license applications must submit documentation sufficient to establish the existence of a contract.

(e) *Commodities and technical data described in paragraph (a) of this section are not eligible for special licenses.*

§ 778.8 Chemical precursors and biological agents, and associated equipment and technical data.

(a) *Validated license requirements.* The following controls are maintained in support of the U.S. foreign policy of opposing the proliferation and illegal use of chemical and biological weapons:

(1) Chemicals identified in ECCN 4798B require a validated license for export from the United States to all destinations except Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom.

(i) A validated license is required for chemical mixtures containing any chemicals identified in 4798B. (Mixtures that contain chemicals controlled under this ECCN are controlled as precursors, except when the precursor chemical is merely an impurity that was not intentionally added or is a normal

ingredient in consumer goods intended for retail sales.)

(ii) A validated license is not required for chemical compounds created with any chemicals identified in 4798B, unless those compounds are also identified in 4798B.

(2) Equipment and materials identified in ECCNs 5129F, 5132F, 5133F, 5134F, 5135F, 5140F, and 5141F, and 5797F in the Commodity Control List, which can be used in the production of chemical weapons precursors or chemical warfare agents, require a validated license for export from the United States to Country Groups S and Z and regions and countries listed in Supplement No. 5 to this part 778.

(3) Viruses and viroids identified in ECCN 4997B and bacteria, fungi, and protozoa identified in ECCN 4998B require a validated license to all destinations except Canada.

(4) Equipment and materials identified in ECCNs 5165F, 5167F, 5170F, and 5997F, which can be used in the production of biological agents, require a validated license for export from the United States to Country Groups S and Z and regions and countries listed in Supplement No. 5 to this part 778.

(5) The following restrictions apply to use of General License GTDR:

(i) General License GTDR is not available for technical data for the production of chemical precursors described in paragraph (a)(1) of this section, except to Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom;

(ii) General License GTDR is not available for the export of technical data for the production of commodities described in paragraphs (a)(2) and (a)(4) of this section, to regions and countries listed in Supplement No. 5 to this part 778;

(iii) General License GTDR is not available for the export of technical data for the production of commodities described in paragraph (a)(3) of this section;

(iv)(A) General License GTDR is not available for technical data for facilities designed or intended to produce chemical weapons precursors controlled by ECCN 4798B on the CCL, involving the following:

(*1*) Overall plant design;

(*2*) Design, specification, or procurement of equipment;

(*3*) Supervision of construction, installation, or operation of complete plant or components thereof;

(*4*) Training of personnel;

(*5*) Consultation on specific problems involving such facilities.

(B) This prohibition on use of General License GTDR does not apply to exports to Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom.

(v) General License GTDR is available only to Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom, for software for process control that is specifically configured to control or initiate the production of chemical weapons precursors controlled by ECCN 4798B.

(b) *Controls on other commodities, technical data, and software.* BXA will review license applications, in accordance with the licensing policy described in paragraph (d) of this section, for commodities, technical data, or software not described in paragraph (a) of this section that:

(1) Require a validated license for reasons other than short supply;

(2) Are destined to a country other than those listed in paragraph (a)(1) of this section; and

(3) Could be destined for the design, development, production, stockpiling, or use of chemical or biological weapons, or for a facility engaged in such activities.

(c) *Additional validated license requirements based on end-uses related to the design, development, production, stockpiling, or use of chemical or biological weapons.* (1) In addition to the validated license requirements described in paragraphs (a) and (b) of this section, a validated license is required to export any commodity, software, or technical data (excluding technical data exportable under the provisions of General License GTDA and commodities identified in ECCN 7599I or 7999I), when the exporter knows that the commodities, software, or technical data will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Supplement No. 5 to this part 778.

(2) BXA may inform the exporter, either individually or through amendment to the regulations in this subchapter, that an individual validated license is required because there is an unacceptable risk of use in or diversion to such activities, anywhere in the world. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration. However, the absence of any such notification does not excuse the exporter from compliance with the validated license requirements of paragraph (c)(1) of this section.

(d) *Licensing policy.* (1) Applications to export the commodities and technical data subject to this policy will be considered on a case-by-case basis to determine whether the export would make a material contribution to the design, development, production, stockpiling, or use of chemical or biological weapons. When an export is deemed to make such a contribution, the license will be denied.

(2) The following factors are among those that will be considered to determine what action should be taken on individual applications:

(i) The specific nature of the end-use;

(ii) The significance of the export in terms of its contribution to the design, development, production, stockpiling, or use of chemical or biological weapons;

(iii) The non-proliferation credentials of the importing country;

(iv) The types of assurances or guarantees against design, development, production, stockpiling, or use of chemical or biological weapons that are given in a particular case; and

(v) The existence of a pre-existing contract.

(3) *Contract sanctity.* The following contract sanctity dates have been established.

(i) The contract sanctity date for exports to Syria of dimethyl methylphosphonate, methyl phosphonyldifluoride, phosphorous oxychloride, thiodiglycol, dimethylamine hydrochloride, dimethylamine, ethylene chlorohydrin (2-chloroethanol), and potassium fluoride is April 28, 1986.

(ii) The contract sanctity date for exports to Iran or Syria of dimethyl phosphite (dimethyl hydrogen phosphite), methyl phosphonyldichloride, 3-quinuclidinol, N,N-diisopropylaminoethane-2-thiol, N,N-diisopropylaminoethyl-2-chloride, 3-hydroxy-1-methylpiperidine, trimethyl phosphite, phosphorous trichloride, and thionyl chloride is July 6, 1987.

(iii) The contract sanctity date for exports to Iran or Syria of items in ECCNs 4997B and 4998B is February 22, 1989.

(iv) The contract sanctity date for exports to Iran of dimethyl methylphosphonate, methylphosphonyl

difluoride, phosphorus oxychloride, and thiodiglycol is February 22, 1989.

(v) The contract sanctity date for exports to Iran, Libya, or Syria of potassium hydrogen fluoride, ammonium hydrogen fluoride, sodium fluoride, sodium bifluoride, phosphorus pentasulfide, sodium cyanide, triethanolamine, diisopropylamine, sodium sulfide, and N,N-diethylethanolamine is December 12, 1989.

(vi) The contract sanctity date for exports to all destinations (except Iran or Syria) of phosphorus trichloride, trimethyl phosphite, and thionyl chloride is December 12, 1989. For exports to Iran or Syria, paragraph (d)(3)(ii) of this section applies.

(vii) The contract sanctity date for exports to all destinations (except Iran, Libya, or Syria) of 2-chloroethanol and triethanolamine is January 15, 1991. For exports of 2-chloroethanol to Syria, paragraph (d)(3)(i) of this section applies. For exports of triethanolamine to Iran, Libya, or Syria, paragraph (d)(3)(vi) of this section applies.

(viii) The contract sanctity date for exports to all destinations (except Iran, Libya, or Syria) of chemicals controlled by ECCN 4798B is March 7, 1991, except for applications to export the following chemicals: 2-chloroethanol, dimethyl methylphosphonate, dimethyl phosphite (dimethyl hydrogen phosphite), methylphosphonyl dichloride, methylphosphonyl difluoride, phosphorus oxychloride, phosphorous trichloride, thiodiglycol, thionyl chloride, triethanolamine, and trimethyl phosphite. (See also paragraphs (d)(3)(vi) and (d)(3)(vii) of this section.) For exports to Iran, Libya, or Syria, see paragraphs (d)(3)(i) through (d)(3)(vi) of this section.

(ix) The contract sanctity date for exports of the following commodities and technical data is March 7, 1991:

(A) Equipment (for producing chemical weapon precursors and chemical warfare agents) described in paragraph (a)(2) of this section;

(B) Equipment and materials (for producing biological agents) described in paragraph (a)(4) of this section; and

(C) Technical data described in paragraph (a)(5) of this section.

(x) The contract sanctity date for license applications subject to paragraphs (b) and (c) of this section is March 7, 1991.

(xi) The contract sanctity date for reexports of chemicals controlled under ECCN 4798B is March 7, 1991, except that the contract sanctity date for reexports of these chemicals to Iran, Libya, or Syria is December 12, 1989.

(xii) The contract sanctity date for reexports of viruses and viroids identified under ECCN 4997B and bacteria, fungi, and protozoa identified under ECCN 4998B is March 7, 1991.

(xiii) Applicants who wish a pre-existing contract to be considered in reviewing their license applications must submit documentation sufficient to establish the existence of a contract.

(4) When preparing a license application for chemicals, applicants shall type the Chemical Abstract Service (C.A.S.) Registry number in Item 9(b) before each chemical name. The C.A.S. numbers are listed with the controlled chemicals in ECCN 4798B under the "List of Chemicals." See Supplement No. 1 to § 799.2 of this subchapter, Interpretation 23: Precursor Chemicals, for synonyms of controlled chemicals in ECCN 4798B.

(e) Commodities and technical data described in paragraph (a) of this section are not eligible for the Distribution License procedure, the Service Supply License procedure, and the Project License procedure.

15. A new § 778.9 is added to read as follows:

§ 778.9 Activities of U.S. persons.

(a) A validated license or reexport authorization is required for the export, reexport, or transfer of any commodities, software, or technical data, regardless of origin, by a U.S. person (defined below) where that person knows that such commodities, software, or technical data:

(1) Will be used in the design, development, production, or use of missiles in or by a country where a project listed in Supplement No. 6 to this part 778 is located; or

(2) Will be used in the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Supplement No. 5 to this part 778.

(b) No U.S. person shall, without a validated license or other authorization from BXA:

(1) Perform any contract, service, or employment that the U.S. person knows will assist in the design, development, production, or use of missiles in or by a country where a project listed in Supplement No. 6 to this part 778 is located;

(2) Perform any contract, service, or employment that the U.S. person knows will assist in the design, development, production, stockpiling, or use of chemical or biological weapons in or by a country listed in Supplement No. 5 to this part 778.

(c) No U.S. person shall, without a validated license or other authorization from BXA, participate in the design, construction, or export of a whole plant to make chemical weapons precursors identified in ECCN 4798B, in countries other than Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom.

(d) No U.S. person shall, without a validated license or other authorization from BXA, knowingly support an export, reexport, or transfer that does not have a validated license or other authorization as required by this section. Support means any action, including financing, transportation, and freight forwarding, by which a person facilitates and export, reexport, or transfer without being the actual exporter or reexporter.

(e) BXA may inform U.S. persons, either individually or through amendment to these regulations, that an individual validated license is required because an activity could involve the types of participation and support described in paragraphs (a) through (d) of this section, anywhere in the world. When such notice is provided orally, it will be followed by a written notice within two working days signed by the Deputy Assistant Secretary for Export Administration.

(f) For purposes of this section, the term *U.S. person* includes:

(1) Any individual who is a citizen or permanent resident alien of the United States;

(2) Any juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; and

(3) Any person in the United States.

(g) It shall be the policy of the Department of Commerce to permit no activity covered by this section that is material in terms of its contribution to the design, development, production, stockpiling, or use of chemical or biological weapons, or of missiles.

(h) See §§ 770.2 and 779.1(a) of this subchapter for definitions of other terms used in this section.

16. A new § 778.10 is added to read as follows:

§ 778.10 Effect of other provisions.

If, at the time of export, a validated license is also required under other provisions of the Export Administration Regulations in this subchapter, the application shall be submitted in accordance with the provisions of this part 778 as well as other applicable provisions. The requirements of this part

778 are applicable in addition to, rather than in lieu of, any other validated license requirement set forth in the Export Administration Regulations in this subchapter. Insofar as consistent with the provisions of this part 778, all of the other provisions shall apply equally to applications for licenses and licenses issued under these special provisions.

17. Part 778 is amended by adding a new Supplement No. 6 to read as follows:

Supplement No. 6—Missile Technology Projects

(No projects are identified at this time.)

PART 779—[AMENDED]

§ 779.4 [Amended]

18. In § 779.4, paragraph (d)(18) is amended by revising the phrase "776.18" to read "778.7".

19. Section 779.4 is amended by adding a new paragraph (j) to read as follows:

§ 779.4 General License GTDR: Technical data under restriction.

* * * * *

(j) Additional restrictions applicable to chemical or biological weapons. In addition to any other restrictions in § 779.4, the use of General License GTDR is further restricted by § 778.8(a)(5) of this subchapter.

Supplement No. 4 to part 779—[Amended]

20. In supplement No. 4 to part 779 (Additional Specifications for Certain Technical Data Requiring a Validated License to all Destinations Except Canada), paragraph (4) is amended by revising the phrase "§ 776.18(a)" to read "§ 778.7(a)(1) of this subchapter" in the following entries: ECCN 1501A, ECCN 4518B, ECCN 1531A, ECCN 1565A, ECCN 1568A, and ECCN 4568B.

PART 799—[AMENDED]

21. In the list below, for each ECCN on the Commodity Control List (Supplement No. 1 to § 799.1) that is indicated in the left column, remove the reference indicated in the middle column from wherever it appears in each ECCN, and add the reference indicated in the right column:

ECCN	Remove	Add
2018A:		
Controls for ECCN heading:		
Commodities Not Eligible for General License GCT	§ 776.18(a)	§ 778.7(a)(1).
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
4131B:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
4133B:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
1361A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1362A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
1385A:		
Controls for ECCN heading:		
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1460A:		
Controls for ECCN heading:		
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1485A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1501A:		
Controls for ECCN heading:		
Reason for Control (2 references)	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1531A:		
Controls for ECCN heading:		
Commodities Not Eligible for General License GCT (2 references).	§ 776.18(a)	§ 778.7(a)(1).
Reason for Control (2 references)	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1548A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1561A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1564A:		
Controls for ECCN heading:		
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1565A:		
Controls for ECCN heading:		
Commodities Not Eligible for General License GCT	§ 776.18(a)	§ 778.7(a)(1).
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).

ECCN	Remove	Add
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1568A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
4568B:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
1595A:		
Controls for ECCN heading:		
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1733A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1746A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18	§ 778.7(a)(1).
Special Licenses Available	§ 776.18(c)	§ 778.7(e).
1763A:		
Controls for ECCN heading:		
Reason for Control	§ 776.18(a)	§ 778.7(a)(1).

21. In Supplement No. 1 to § 799.1 (the Commodity Control List), Commodity Group 7 (Chemicals, Metalloids, Petroleum Products and Related Materials), ECCN 4798B is amended by revising the Validated License Required and Special Licenses Available paragraphs, as follows:

4798B Precursor and intermediate chemicals used in the production of chemical warfare agents.

Controls for ECCN 4798B

Unit: * * *

Validated License Required: All destinations except Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Switzerland, Turkey, and the United Kingdom, except as provided below.

(a) *Sample Shipments:* General License G–DEST is available for one sample shipment of a 55-gallon container (209 liters) or less of each chemical to any one consignee per calendar year (not applicable to Country Groups S and Z, Iran, Iraq, or Syria).

(b) *Compounds:* General License G–DEST is available, except to Country Groups S and Z, and the South African military and police, for compounds that are created from chemicals controlled under this ECCN 4798B provided that the compound itself is not controlled under this ECCN or another ECCN on the CCL. (Mixtures that contain chemicals controlled under this ECCN are controlled as precursors, except when the precursor chemical is merely an impurity that was not intentionally added or is a normal ingredient in consumer goods intended for retail sales.)

* * * * *

Special Licenses Available: See part 773 of this subchapter.

* * * * *

Dated: August 9, 1991.

James M. LeMunyon,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 91–19505 Filed 8–14–91; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 500 and 589

[Docket No. 87N–0378]

Gentian Violet in Animal Feed; Gentian Violet for Use in Food Animals

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to declare that gentian violet is neither generally recognized as safe (GRAS) nor prior sanctioned and is a food additive when added to animal feed for any nondrug use. FDA is also amending its regulations to reflect its determination that gentian violet is not GRAS, generally recognized as effective (GRAE), or "grandfathered" under the Drug Amendments of 1962, and is therefore a new animal drug when used for any veterinary drug purpose in food animals. Finally, FDA is revoking its interim policy permitting the use of gentian violet at levels up to 8 parts per million (ppm) as a mold inhibitor in poultry feed. Continued marketing of gentian violet for use in any food animal species will be permitted only under provision of a food additive regulation or an approved new animal drug application (NADA). There are currently no published food additive regulations or approved NADA's for gentian violet in food animals.

This final rule is based on FDA's conclusion that the criteria for GRAS and GRAE status are not met with respect to the use of gentian violet in food animals. FDA has concluded, based on studies conducted by its National Center for Toxicological Research (NCTR), that gentian violet causes cancer in test animals and that residues of gentian violet occur in the edible tissues of chickens under the current uses.

DATES: This final rule is effective September 16, 1991, at which time manufacturer of gentian violet premixes must cease. The agency's interim policy, adopted July 27, 1982 (47 FR 32480), permitting the use of gentian violet for the prevention of mold growth in poultry feed at up to 8 ppm, is hereby revoked as of September 16, 1991. After the effective date of the final rule, any gentian violet premix intended for use in food-producing animals will be in violation of the Federal Food, Drug, and Cosmetic Act (the act). In order to allow for an orderly phaseout, however, distribution of premixes shall cease by September 30, 1991; and distribution and use of poultry feed containing gentian violet shall cease by October 15, 1991.

FOR FURTHER INFORMATION CONTACT: George Graber, Center for Veterinary Medicine (HFV–220), Food and Drug

Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4438.

SUPPLEMENTARY INFORMATION:

I. Summaries of and Responses to Comments

In the **Federal Register** of February 13, 1990 (55 FR 5194), FDA proposed that 21 CFR part 500 be amended by establishing new §§ 500.29 and 500.30, respectively, providing that gentian violet is not generally recognized as safe (GRAS) for use in animal feed and is a food additive required to be the subject of a food additive regulation providing for its safe use under section 409 of the act (21 U.S.C. 348), unless its intended use makes it a drug. In that case, gentian violet is a new animal drug required to be the subject of an approved NADA under section 512 of the act (21 U.S.C. 360b). In addition, FDA proposed to amend 21 CFR part 589 by establishing a new § 589.1000 listing gentian violet as a substance prohibited from use in animal food or feed.

The proposal provided 60 days for interested persons to comment. The agency received 15 comments on the proposal—8 from poultry producer organizations, 2 from manufacturers of gentian violet, 2 from distributors of animal health products including gentian violet, and 1 each from a poultry producer, a veterinarian, and a state department of agriculture. All the responses opposed the proposed action. However, only one of the comments submitted documents, data, and other supporting information that responded directly to the issues addressed in the proposal.

None of the comments submitted or provided citations to published studies that would support the contention that gentian violet is GRAS from a human food safety standpoint. In the preamble to the proposal, FDA reported not only the existence of studies (mostly unpublished) showing that gentian violet is an animal carcinogen, but FDA also reported a scarcity of the kinds of published studies required to support an expert opinion that gentian violet is GRAS based on scientific procedures. The agency's literature search generally found that the published literature that does exist demonstrates that gentian violet tends to have mutagenic, genotoxic, and other toxic properties (55 FR 5194 at 5201). The agency also described studies, published and unpublished, that demonstrate that residues of gentian violet occur in edible portions of chicken after administration of the substance to poultry (55 FR 5194 at 5198 and 5200).

Thus, the comments failed to refute the agency's initial conclusion that the foundation upon which a finding of general recognition of safety by experts must rest—that is, published literature establishing the safety of the substance for use in animal feed—does not exist. Further, none of the comments were from persons who purported to be qualified experts, and none of the comments contained statements from experts that gentian violet is GRAS based on published studies. One comment, from Cambridge Products, Ltd., a gentian violet premix distributor, and Naremco, Inc., a gentian violet premix manufacturer, contained the curriculum vitae of consultants who are employed by consulting firms and a private testing laboratory that have provided services to Cambridge and Naremco in connection with gentian violet. (For the sake of convenience, the two firms are referred to hereafter as Cambridge Naremco.) However, the comment did not contain any statement from any of those consultants to the effect that gentian violet is GRAS based on published literature. None of the comments challenged on sound scientific grounds FDA's conclusion that gentian violet has been shown to be an animal carcinogen, but a comment argued that the substance is a weak carcinogen rather than a potent carcinogen as FDA contended in the proposal.

None of the comments claimed that gentian violet is GRAS on the basis of common use in food prior to January 1, 1958. Also, none of the comments contended that gentian violet is prior sanctioned for any use in animal feed. Finally, none of the comments provided any support for the contention that gentian violet is GRAS and GRAE for animal drug use, and none of the comments contended that gentian violet is grandfathered under the 1962 grandfather clause, as reflected in section 108(b)(3) of the Animal Drug Amendments of 1968, Public Law 90-399, 82 Stat. 342 (1968).

A summary of the comments received and FDA's responses are as follows:

1. One comment contended that there is enough information, available to the public, to support GRAS status for gentian violet. The comment referred to data and information concerning risk assessments for gentian violet, a regulatory method and target animal safety. The comment noted that the data and information concerning risk assessment and a regulatory method had been placed in the FDA docket on this matter, and had been cited in Food Chemical News and another trade publication. The comment also submitted literature citations concerning studies related to target animal safety. The comment contended that filing documents in the docket, and referring to documents in a trade publication, essentially constitute publication for the purpose of a GRAS determination.

The comment ignored the need for published studies concerning the underlying safety issues in this proceeding, namely, gentian violet's toxicity and the amount and kind of residues that occur in human food (55 FR 5194 at 5195 through 5196 and sources cited there). Furthermore, the agency disagrees with the comment's contention that filing documents in the docket, and providing reference to the documents in trade publications, constitute publication for the purpose of a GRAS determination. Published studies are needed for general recognition based on scientific procedures, because the results of the studies must be generally available to experts. Id. See also *United States* v. *Seven Cardboard Cases * * * "100 Capsules NDC * * * Esgic * * * with Codeine Capsules, etc." and Forest Pharmaceuticals, Inc.*, 716 F. Supp. 1221, 1223-1225 (E.D. M. 1989) and cases cited there (hereafter referred to as *Esgic*). Publication in the scientific literature ordinarily makes sufficient details from a study readily available for peer review, so that experts in the applicable field may form an opinion as to the safety of the substance. See 55 FR 5194 at 5195 through 5196; *Esgic*, 716 F. Supp. at 1224-1225 and cases cited there; *United States* v. *118/100 Tablet Bottles, etc.*, 662 F. Supp. 511, 513 (W.D. La.) ("Unless * * * data are made available to the community of experts and thereby subject to peer evaluation, criticism, and review, a consensus among experts cannot be reached. Consequently, the requisite * * * investigations must be published in the scientific literature and thus be made available generally to experts * * *.").

The methods proposed by the comment do not accomplish that purpose. Although published studies may be corroborated by unpublished studies and other data and information, there must be sufficient published studies to permit experts to form an opinion that a substance is safe. In this case, neither the comments nor FDA's literature reviews disclosed the existence of such studies. (The published literature concerning target animal safety referred to by this comment is discussed in section I, paragraph 6 of this preamble.)

2. One comment asserted that the risk of cancer in humans from the use of gentian violet in poultry feed is less than 1 in 1 million. The comment noted that the standard for GRAS status is the same as that for premarket approval and that the premarket approval standard for a carcinogenic animal food additive is an additional lifetime cancer risk of less than 1 in 1 million, and claimed that the use of gentian violet in poultry feed at a level of 8 ppm meets the latter standard. Therefore, according to the comment, the use of gentian violet in poultry feed at a level of 8 ppm is GRAS. The comment, from Cambridge Naremco, was accompanied by a copy of a gentian violet food additive petition that Cambridge Products, Ltd., had submitted earlier to the agency. The firms base their risk assessment calculation on a residue study for them and on food consumption factors that differ from those used by FDA in making assessments for animal food additives.

FDA agrees that the scientific standards for GRAS status and premarket approval are the same. The procedures by which the two determinations are made, however, are distinctly different. GRAS status is established from a determination of the opinions of experts as to the substance's safety, and the opinions must be based on published literature. Premarket approval is based on a FDA review of data and information, ordinarily unpublished, submitted in a food additive petition. By submitting a copy of their food additive petition in this proceeding, and by relying primarily on unpublished data, Cambridge Naremco have essentially asked the agency to obliterate the distinction between GRAS determinations and actions on food additive petitions.

The comment therefore has not established that, based on published literature, experts generally recognize that the use of gentian violet in poultry feed causes an additional risk of cancer of less than 1 in 1 million. Because the comment has not made even a prima facie case, it is unnecessary for the agency to respond to the comment's contention that the agency uses incorrect food consumption factors in its approval decisions. In any event, a challenge to preapproval standards can properly be raised only in the context of a premarket approval proceeding, e.g., action on a food additive petition.

3. Several comments argued that FDA should allow gentian violet to stay on the market because the substance has a long history of safe use both in animal feed and human medicine.

A history of safe use does not provide a legal basis for adding a substance to food, unless the substance is GRAS based on common use in food prior to January 1, 1958. As explained in the narrative preceding the numbered paragraphs and in section I, paragraph 1 of this preamble, however, none of the comments submitted information to support GRAS status of gentian violet based on common use in food prior to January 1, 1958. Moreover, the public is exposed indiscriminately to food additive residues, and the elapsed time between exposure to a carcinogen and the development of tumors may be years. Thus, it is virtually impossible to assess the safety of a carcinogen based solely on its history of use. Finally, as pointed out in the proposal (55 FR 5194) the internal use of gentian violet in human medicine in this country today is extremely limited.

4. One comment stated that, as a matter of law, a substance can be a carcinogen and at the same time be GRAS.

The agency agrees that, in theory, a carcinogen can be GRAS. However, the agency remains firmly committed to its position, stated in the preamble to the proposal (55 FR 5194 at 5196) that, as a practical matter, such recognition is unlikely because of the requirement that the data and information needed to support GRAS status be published and generally available to experts. The comment, by Cambridge Naremco, did not challenge the agency's explanation but instead contended that it tended to support Cambridge Naremco's position that the agency is not willing to review their scientific data and analysis in a fair and impartial manner. This latter allegation is addressed in section I, paragraph 8 of this preamble.

5. One comment, from Cambridge Naremco, contended that there are serious shortcomings in the toxicological studies conducted by the NCTR that were cited by FDA in its proposal. The comment did not describe the alleged shortcomings, but instead attached copies of letters Cambridge Products, Ltd., had written to the agency commenting on the studies.

The agency responded to Cambridge Naremco's criticisms, in 1987, 1988, and 1989 in letters to Cambridge Products, Ltd. (Refs. 1 through 8). These letters are referred to in paragraph 8 of this preamble. The agency notes that, in its food additive petition, Cambridge relies on all the NCTR studies except one in support of its contention that gentian violet is safe, thus conceding the validity of the studies.

6. One comment submitted references to six published articles to show that gentian violet is GRAS to the target animal, i.e., poultry.

The agency has reviewed the literature cited by the comment, and has found that these studies were not adequately designed for the purpose of assessing the safety of gentian violet to poultry. Although the work of Cross and Hughes in breeder chickens addressed some safety parameters, this study did not include a control group, and neither a histopathological analysis of reproductive tissues of the parent nor a teratological analysis of the offspring was completed. The research of Stewart and colleagues also does not qualify as a safety study. The studies conducted by these researchers evaluated gentian violet for its growth promotion and pharmacologic activity. The study by Churchman and Herz cited by the comment provided only a general description of studies in which rabbits and dogs received gentian violet intravenously, and the work reported by Cutlip and Monlux was with dogs and cattle. The study by Kingsland and Anderson addressed the utility of gentian violet, and not its safety. In the work reported by Veltman and Jensen, gentian violet's toxicity was not being studied. Rather, these researchers were investigating the effects of certain feed additives on the incidence of a bone ailment in poultry, and gentian violet was one of the additives studied.

The studies referred to by the comment fail to show that gentian violet is safe for poultry. Furthermore, the lack of published studies assessing safety in the target animal species precludes a finding of general recognition of safety to poultry.

7. Several comments asserted that the agency could not, by issuing a regulation, "overrule" the 1981 decision in the United States District Court for the Northern District of Georgia to the effect that gentian violet is GRAS under certain conditions of use.

The comments did not provide any authority to support their position. It is beyond question that a court may grant relief from the continuing effects of a judgment because of a change in the operative facts, in this case, the scientific information that is available concerning the safety of gentian violet. Put another way, current general recognition must be proved in order to avoid the requirement of premarket approval. See *United States* v. *Wester Serum Co., Inc.*, 666 F. 2d 335, 339–341 (9th Cir. 1982).

8. Several comments asserted the agency had treated Cambridge Naremco unfairly with respect to the firms' attempts to market gentian violet. With the exception of the allegation concerning general recognition of a

carcinogen, discussed in section I, paragraph 4 of this preamble, the comments did not provide specific examples to support their contentions.

FDA believes that the agency has treated Cambridge Naremco fairly. The assertions are irrelevant to the question whether gentian violet is GRAS for animal food use. Furthermore, although the burden of conducting studies to support a food additive petition is on the marketer of the product, see, e.g., section 409(b)(2) of the act, FDA took the extraordinary step of conducting safety studies on gentian violet (the NCTR studies) at Government expense. The results of these studies are available to any party, and have been used by Cambridge Products, Ltd., in support of its food additive petition. In addition, in 1981 FDA voluntarily entered into a stipulated stay order that permitted Naremco to resume the marketing of gentian violet. (Naremco, Inc., was enjoined in 1977 from marketing gentian violet (55 FR 5194 at 5195).) Thereafter, between 1981 and 1989, in the context of the stipulated order, the agency devoted hundreds of hours responding in detail to Cambridge Products, Ltd.'s, criticisms of the NCTR studies. (Cambridge's comments on the NCTR studies were submitted to FDA in accordance with the procedure established in the stay order.) See, e.g., Refs. 1 through 8. Moreover, FDA voluntarily permitted Cambridge Naremco to continue to market their gentian violet products until the issuance of a final rule, even though the agency could have asked the court to reinstate the injunction against Naremco's marketing of gentian violet.

9. Several comments contended that FDA should study the benefits and the risks of the use of gentian violet before deciding whether to adopt the proposed regulation.

FDA may not and does not take benefits into account when making food additive determinations and decisions. See "Diethylstilbestrol; Withdrawal of Approval of New Animal Drug Applications; Commissioner's Decision," in the **Federal Register** of September 21, 1979, 44 FR 54852 at 54882 through 54883.

10. A number of comments argued that the agency's economic analysis is wrong, on the ground that propionic acid is not a viable alternative (as the agency had assumed) because of an alleged lack of effectiveness, corrosiveness, higher cost, and increases in the growth of molds and mycotoxin levels in animal feed as a result of its use. One comment, relying on two journal articles, claimed that the use of propionic acid could result in increases in mycotoxin levels in feeds.

Only one comment, by Cambridge Naremco, submitted an alternative economic analysis, and that analysis assumed that there were no alternatives available. None of the comments submitted documentation to support Cambridge Naremco's position concerning propionic acid, or their contention that no other alternatives are available. Propionic acid and its various salts are used by the feed industry as mold inhibitors in poultry feed, and firms are marketing noncorrosive propionic acid products. Further, the alleged increase in mycotoxin levels resulting from propionic acid use is without foundation.

FDA believes the two journal articles are of questionable value because, for example, the work was not done in grain or feed but rather in a liquid medium. No aflatoxin (a mycotoxin) was detected in the poultry feed regardless of the level or presence of propionic acid, according to one of the articles.

Thus, the economic impacts projected by Cambridge Naremco are tremendously inflated and, as such, are without merit.

In response to the comments, the agency has reexamined its economic assessment and made minor changes, but the estimated annual impact remains at $5.1 million, which does not approach the threshold for a "major rule" under Executive Order 12291. The economic impact of the rule is discussed in greater detail in section II. B. A copy of the revised assessment supporting the agency's determinations is on file with the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

11. One comment stated that FDA had not adequately addressed the environmental impact of the proposal because it failed to consider the environmental impacts of the alternative products.

The agency disagrees with this comment, and concludes that its environmental assessment adequately considers the alternative products, in particular the propionic-based products. The environmental impacts of propionic acid and its salts are expected to be identical to each other when used in feeds for animals. As noted in section I, paragraph 10 of this preamble, noncorrosive salts of propionic acid are on the market.

12. One comment argued that FDA should withdraw the proposed rule or, at a minimum, hold the rulemaking in abeyance pending approval of gentian violet as a food additive.

FDA disagrees. It is publishing the final rule for the reasons discussed throughout this preamble. Cambridge products, Ltd.'s, food additive petition is pending before the agency, which has provided the firm a detailed explanation (Ref. 9) of why the petition is inadequate to serve as the basis of the requisite food additive regulation for gentian violet. There is thus no reason to hold this rulemaking proceeding in abeyance pending the outcome of the food additive proceeding.

13. On its own initiative, FDA has made several minor clarifying changes in the text of the regulations. For example, in § 589.1000, the agency has added language clarifying that gentian violet is not prohibited from use in animal food and feed if it is covered by an effective notice of claimed investigational exemption for a food additive under 21 CFR 570.10 or for a new animal drug under 21 CFR part 511.

In summary, after careful consideration of the comments, FDA has concluded that;

1. Gentian violet is not GRAS for use in animal feed and is a food additive subject to section 409 of the act.

2. Gentian violet is not prior sanctioned for use in animal feed.

3. Gentian violet is not GRAS or GRAE for any veterinary drug use, and therefore is a new animal drug subject to section 512 of the act. Gentian violet is not "grandfather" under provisions of the Drug Amendments of 1962.

This final rule is effective September 16, 1991, at which time manufacture of gentian violet premixes must cease. The agency's interim policy, adopted July 27, 1982 (47 FR 32480), permitting use of gentian violet for the prevention of mold growth in poultry feed at up to 8 ppm, is hereby revoked as of September 16, 1991.

After the effective date of the final rule, any gentian violet premix intended for use in food-producing animals will be in violation of the act, unless covered by a food additive regulation or an effective notice of claimed investigational exemption for a food additive. (If gentian violet is intended for use as a new animal drug, it must be the subject of an approved new animal drug application or an effective notice of claimed investigational exemption for a new animal drug.) In order to allow for an orderly phaseout, however, distribution of premixes shall cease by September 30, 1991; and distribution and use of poultry feed containing gentian violet shall cease by October 15, 1991.

The phase-out schedule that the agency has established for gentian violet in animal feed is consistent with the

applicable provision of the Administrative Procedure Act, 5 U.S.C. 553(d), and past FDA practice. Alternatives to gentian violet are available, and have been in use for a number of years. The agency's intention to require discontinuation of the use of gentian violet has been known to the industry for several years, so the industry has had adequate time to prepare. In view of the fact that gentian violet has been shown to be a potent animal carcinogen, the FDA has concluded that any further delay in implementation of the final regulation would be inappropriate.

II. Environmental and Economic Impact

A. Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded that the action will not have a significant impact on the human environment, and that an environmental impact statement is not required. The agency's finding of no significant impact and the evidence supporting the finding are contained in an environmental assessment which may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

B. Economic Impact

In response to comments submitted, the agency has reexamined the economic impact of the final regulation in accordance with Executive Order 12291 and the Regulatory Flexibility Act (Pub. L. 96–354). FDA estimates that gentian violet is added to roughly 40 percent of poultry food. The 60 percent not treated with gentian violet may either be treated with alternative mold inhibitor or no mold inhibitor. The agency expects most poultry producers who currently use gentian violet as a mold inhibitor to switch to an alternative mold inhibitor, e.g., propionic acid and its salts. As poultry producers switch from gentian violet to propionic acid, the production costs will increase, since propionic acid is usually more expensive. FDA estimates that a total annual nationwide cost of $5.1 million or less will be incurred by those who switch. This cost increase reflects the difference in price between propionic acid and gentian violet. However, this cost increase may be mitigated if the alternative mold inhibitor is more effective than gentian violet (assuming that gentian violet is an effective mold inhibitor.)

There is some imprecision in the $5.1 million cost estimate, because the agency believes that a portion of gentian violet users employ the compound to treat fungal infections rather than to inhibit mold growth. Treating fungal infections with gentian violet is an unapproved drug use. If poultry producers who use gentian violet for treating fungal infections switch to a therapeutic agent approved for this use (nystatin), they may realize a savings as a result of lower disease-related losses. However, these potential savings could be partially or totally offset by the difference in price between the two compounds. Based on its examination, FDA concludes that the economic effects attributable to the proposed regulation do not warrant its treatment as a major rule as defined in Executive Order 12291.

With regard to the Regulatory Flexibility Act, the agency finds that this regulation will affect about 10 to 15 firms in the mold inhibitor manufacturing industry. Most of these firms are small businesses which currently produce and/or market alternative mold inhibitors; therefore, their lost gentian violet sales will probably be replaced by sales of other products, resulting in minimal impacts. However, it is possible that a few of these firms, for whom gentian violet mold inhibitor is a major source of revenue, may suffer losses due to the regulation. The regulation will also affect several hundred distributors and dealers who carry gentian violet as part of their product lines. However the regulation's impact on distributors and dealers will be almost imperceptible, because they also are expected to replace the lost gentian violet with sales of alternative mold inhibitors. Therefore, the proposed regulation will not have a significant effect on a substantial number of firms, and it does not warrant a regulatory flexibility analysis under Pub. L. 96–354.

A copy of the assessment supporting these determinations is on file with the Dockets Management Branch (address above).

III. References

The following references, together with the documents cited in the preamble, have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Letter of July 9, 1987, from John A. Norris, Deputy Commissioner, FDA, to Jack L. Radlo, Chairman, Cambridge Products, Ltd.

2. Letter of November 27, 1987, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

3. Letter of January 12, 1988, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

4. Letter of February 1, 1989, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

5. Letter of March 29, 1989, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

6. Letter of July 21, 1989, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

7. Letter of December 6, 1989, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

8. Letter of December 6, 1989, from Gerald B. Guest, Director, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

9. Letter of December 14, 1990, from George Graber, Director, Division of Animal Feeds, Center for Veterinary Medicine, to Jack L. Radlo, chairman of the board, Cambridge Products, Ltd.

List of Subjects in 21 CFR

Part 500

Animal drugs, Animal feeds, Cancer, Labeling, Polychlorinated biphenyls (PCB's).

Part 589

Animal feeds, Animal foods, Food additives.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 500 and 589 are amended as follows:

PART 500—GENERAL

1. The authority citation for 21 CFR part 500 continues to read as follows:

Authority: Secs. 201, 301, 402, 403, 409, 501, 502, 503, 512, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 331, 342, 343, 348, 351, 352, 353, 360b, 371).

2. New §§ 500.29 and 500.30 are added to subpart B to read as follows:

§ 500.29 Gentian violet for use in animal feed.

The Food and Drug Administration has determined that gentian violet is not generally recognized as safe for use in animal feed and is a food additive subject to section 409 of the Federal Food, Drug, and Cosmetic Act (the act).

unless it is intended for use as a new animal drug, in which case it is subject to section 512 of the act. The Food and Drug Administration has determined that gentian violet is not prior sanctioned for any use in animal feed.

§ 500.30 Gentian violet for animal drug use.

The Food and Drug Administration (FDA) has determined that gentian violet is not generally recognized as safe and effective for any veterinary drug use in food animals and is a new animal drug subject to section 512 of the Federal Food, Drug, and Cosmetic Act. FDA has determined that gentian violet is not exempted from new animal drug status under the "grandfather" provisions of the Drug Amendments of 1962 (21 U.S.C. 342).

PART 589—SUBSTANCES PROHIBITED FROM USE IN ANIMAL FOOD OR FEED

3. The authority citation for 21 CFR part 589 continues to read as follows:

Authority: Secs. 201, 402, 409, 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 371).

4. New subpart B consisting of § 589.1000 is added to read as follows:

Subpart B—Listing of Specific Substances Prohibited From Use in Animal Food or Feed

§ 589.1000 Gentian violet.

The Food and Drug Administration has determined that gentian violet has not been shown by adequate scientific data to be safe for use in animal feed. Use of gentian violet in animal feed causes the feed to be adulterated and in violation of the Federal Food, Drug, and Cosmetic Act (the act), in the absence of a regulation providing for its safe use as a food additive under section 409 of the act, unless it is subject to an effective notice of claimed investigational exemption for a food additive under § 570.17 of this chapter, or unless the substance is intended for use as a new animal drug and is subject to an approved application under section 512 of the act or an effective notice of claimed investigational exemption for a new animal drug under part 511 of this chapter.

Dated: February 22, 1991.

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91-19381 Filed 8-14-91; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

[T.D. 8357]

RIN 1545-AI79

26 CFR Parts 1, 54, and 602

Certain Cash or Deferred Arrangements and Employee and Matching Contributions Under Employee Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to certain cash or deferred arrangements (CODAs) and employee and matching contributions under employee plans. They generally reflect changes in the applicable tax law made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, and the Omnibus Budget Reconciliation Act of 1989. The regulations provide the public with the guidance needed to comply with the law and affect sponsors of plans that contain cash or deferred arrangements or employee or matching contributions, and employees who are entitled to make elections under these plans.

EFFECTIVE DATES: These regulations are effective as follows:

Section 1.401(a)-30, Plan years beginning after December 31, 1987.

Section 1.401(k)-0, Plan years beginning after December 31, 1979.

Section 1.401(k)-1, Plan years beginning after December 31, 1979, except as otherwise stated in paragraph (h) of the section.

Section 1.401(m)-0, Plan years beginning after December 31, 1986.

Section 1.401(m)-1, Plan years beginning after December 31, 1986.

Section 1.401(m)-2, Plan years beginning after December 31, 1988.

Section 1.402(a)-1(d), Taxable years beginning after June 27, 1974.

Section 1.402(g)-0, Taxable years beginning after December 31, 1986.

Section 1.402(g)-1, Taxable years beginning after December 31, 1986.

Amendment to § 1.411(a)-4, Taxable years beginning after December 31, 1986.

Section 1.411(d)-4, A-2(b)(2)(x), Plan amendments made after July 30, 1984.

Section 1.411(d)-4, A-2(b)(2)(xi), Limitation years beginning after December 31, 1986.

Amendment to § 1.415-6, Plan years beginning after December 31, 1986.

Amendment to § 1.416-1, Plan years beginning after December 31, 1986.

Section 54.4979-0, Plan years beginning after December 31, 1986.

Section 54.4979-1, Plan years beginning after December 31, 1986.

Amendment to § 602.101(c), August 15, 1991.

Portions of these regulations become applicable to various taxpayers and plans as of dates other than the effective dates listed above.

FOR FURTHER INFORMATION CONTACT: Catherine Livingston Fernandez, at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this final regulation has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control numbers 1545-1069 and 1545-1039.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents/recordkeepers may require greater or less time, depending upon their particular circumstances. The estimated annual burden per respondent/recordkeeper varies from 30 minutes to 4.5 hours, depending on individual circumstances, with an estimated average of 2.1 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Washington, DC 20224, attention: IRS Reports Clearance Officer, and to the Office of Management and Budget, attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Background

On November 10, 1981, the **Federal Register** published proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 401(k) and 402(a)(8) of the Internal Revenue Code (Code), 46 FR 55544. The amendments were proposed to conform the regulations to section 135 of the Revenue Act of 1978, Public Law No. 95-600, 92 Stat. 2763, 2785 (1978). Final regulations were issued on August 8, 1988, 53 FR 29658. At the same time, additional amendments to the Income Tax Regulations were proposed under sections 401(k), 401(m), 402(g), 414(q), 414(s), 415, 416, and 4979 of the Code, 53 FR 29719. These amendments were

proposed to conform the regulations to sections 1105, 1116, and 1117 of the Tax Reform Act of 1986 (TRA '86). Further guidance on CODAs and employee and matching contributions was provided by Notice 88–127, 1988–2 C.B. 538, and Revenue Procedure 89–65, 1989–2 C.B. 786. The proposed regulations were modified on May 14, 1990, 55 FR 19947, to simplify the calculation for aggregating family members, and to modify the multiple use limitation. Additional guidance applicable to defined contribution plans, including those with CODAs and employee and matching contributions, was contained in proposed regulations under section 401(a)(4) published on September 14, 1990, 55 FR 37888.

A public hearing on the 1988 proposed regulations was announced on January 27, 1989, 54 FR 4045, and held on March 14, 1989. A public hearing on the regulations proposed on May 14, 1990, was held on September 26–28, 1990.

The Department of the Treasury and the Internal Revenue Service have considered all of the comments regarding the 1988 proposed and final regulations. This Treasury Decision consolidates the 1988 proposed and final regulations, with modifications, into a complete set of regulations providing comprehensive guidance on qualified CODAs, and employee and matching contributions. These regulations replace all of the 1988 proposed and final regulations on these subjects, and the amendments to regulations under section 401 (k) and (m) issued on May 14, 1990. They consolidate and reorganize the regulations in order to improve their comprehensiveness and readability. Furthermore, they reflect subsequent statutory changes, simplify certain aspects of the existing requirements, and provide needed guidance on other aspects of qualified CODAs and employee and matching contributions.

Qualified Cash or Deferred Arrangements and Employee and Matching Contributions

1. Limit on Elective Deferrals

The Technical and Miscellaneous Revenue Act of 1988, Public Law No. 100–647 (TAMRA), section 1011(c)(7)(A), enacted Code section 401(a)(30). Section 401(a)(30) makes the dollar limit imposed on elective deferrals under section 402(g) a qualification requirement for plans maintained by the same or related employers. Section 1.401(a)–30 has been added to the regulations to reflect this requirement. As a result, plans must be amended to restrict a participant's elective deferrals for a taxable year to the dollar limit in effect for that taxable year. The limit is imposed on the participant's combined elective deferrals under all plans, contracts, or arrangements of the employer maintaining the plans and all related employers.

If an individual defers more than the maximum for a taxable year under plans of two or more unrelated employers, generally none of the plans is disqualified due to the excess. The individual may not, however, exclude the excess deferrals from gross income. Also, unless the excess deferrals are timely corrected under section 402(g)(2), they are taxed again when distributed from the plan, since they do not increase the employee's investment in the contract under section 72.

On the other hand, if an individual defers more than the maximum under a single plan or under plans of the same or related employers, the plan or plans are all generally disqualified. However, final regulations under section 402(g) provide that corrective distributions for purposes of section 402(g) under one or more plans of the same or related employers also prevent disqualification in operation under section 401(a)(30). In these cases, the plan or plans may provide that the employee is deemed to have made the designation normally required for the distribution of excess deferrals, or that the employer may make the designation.

Excess deferrals (whether they occur under plans of unrelated employers or under a plan or plans of the same or related employer) distributed to a highly compensated employee are taken into account in determining the employee's actual deferral ratio for the plan year for which they were contributed. Excess deferrals distributed to a nonhighly compensated employee are not taken into account if they were under a plan or plans of the same or related employers.

2. Partnership Cash or Deferred Arrangements

The 1988 proposed regulations clarified that partnerships could maintain cash or deferred arrangements (CODAs) covering partners. It also provided that an arrangement that directly or indirectly permitted individual partners to vary the amount of contributions made on their behalf was a CODA. Under the 1988 proposed regulations, any elective contributions under this type of arrangement were after-tax contributions (i.e., not deductible by the partners) if the arrangement was not a qualified CODA. If the arrangement was a qualified CODA, the amount of elective contributions that a partner could deduct for any taxable year was limited under section 402(g). This limit is $8,475 for taxable years beginning in 1991.

Many commentators were concerned about plans providing a fixed rate of contributions for all partners and employees but allowing each partner to elect not to participate or to have a smaller percentage of compensation contributed by the partnership on the partner's behalf. For example, some plans provided for contributions equal to 10 percent of compensation for each partner or employee, but permitted any partner to elect to have no contribution (or a contribution of less than 10 percent) made. The commentators argued that these plans should not be treated as CODAs because they result in lower contribution rates for partners (generally the more highly compensated participants) than for employees. They also noted that before the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), plans were required to allow owner-employees to elect not to participate. Many partnerships maintained plans with these provisions for many years and continued them after TEFRA repealed this requirement.

The final regulations continue to provide that any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf is a CODA. Neither the Revenue Act of 1978 (sections 131–135), the legislative history of that Act, nor later legislation relating to section 401(k) provides a statutory basis for permitting self-employed individuals to defer compensation on an elective, pre-tax basis under a qualified plan except as provided under section 401(k). In addition, to permit partners to defer more than the section 402(g) limit on an elective, tax-favored basis would provide partnerships with a significant advantage over corporations. This would be inconsistent with TEFRA's policy establishing parity between plans covering partners and those covering other employees.

A partnership, like any other employer, may allow each of its employees (including partners, who are treated as employees under section 401(c)) to make a one-time irrevocable election, upon commencement of employment or initial eligibility under any plan of the employer, to have a specified amount or percentage of compensation (including no amount) contributed by the employer throughout the employee's employment. This permits employees to elect different rates of employer contributions, but the arrangement is not treated as a CODA. See § 1.401(k)–1(a)(3)(iv). These

employer contributions must satisfy section 401(a)(4), without relying on the actual deferral percentage (ADP) or actual contribution percentage (ACP) test. Since the contributions are not treated as elective, they are subject to neither the vesting and distribution restrictions under section 401(k), nor the section 402(g) limit on elective contributions.

Notice 88–127, 1988–2 C.B. 538, gave partnership plans until the later of March 31, 1989, or the first day of the first plan year beginning after December 31, 1988, either to be amended to become qualified CODAs or to require employees and partners to make one-time irrevocable elections. The latter approach permitted current employees and partners, as well as new ones, to make one-time irrevocable elections without causing the plan to become a CODA. The final regulations include this provision. Of course, the partnership could instead have amended the plan to eliminate the election within the specified time.

Many partnerships may have missed the deadline for requiring elections to take advantage of this relief, thereby jeopardizing the qualification of their arrangements or plans. To enable these partnership plans to avoid disqualification, the Service is issuing Rev. Proc. 91–47, to be published in Internal Revenue Bulletin 34, dated August 26, 1991. This Revenue Procedure gives limited relief to partnership plans that missed the deadline. It provides that the Service will not disqualify the plans or the CODAs if certain steps are taken during the section 401(b) remedial amendment period.

The 1988 proposed regulations were generally effective for plan years beginning after 1986. Many partnerships objected that the general effective date would have applied these requirements to their plans retroactively. In response, as announced in Notice 88–127, 1988–2 C.B. 538, the final regulations provide that § 1.401(k)–1(a)(6)(ii) is effective for contributions to partnership plans for plan years beginning after 1988.

A number of commentators requested that the Service clarify the timing of a partner's election to defer compensation. Under section 704, a partner's distributive share of partnership income is determined as of the last day of the partnership's taxable year, and the partner is taxed on the distributive share in the partner's taxable year in which the partnership's taxable year ends, whether or not it is actually distributed. Some commentators asked whether the cash or deferred election had to be made before the partner was entitled to receive a draw of partnership income (which would be reduced by the election). Other commentators asked whether the election had to be made by the end of the partnership's taxable year or could be delayed until the deadline for filing the partnership's tax return. The tax return deadline was suggested because each partner's precise share of partnership income may not be known until the return is filed. The final regulations follow the suggestion of some commentators that the election may be made at any time before the end of the partnership's taxable year (since that is the date on which, but for the election, the compensation would be includible in the partner's taxable income). However, the election may not be made after the end of that taxable year. In addition, for plan years beginning before January 1, 1992, a plan may permit a partner to make a cash or deferred election until the due date, including extensions, for filing the partnership's Federal income tax return for its taxable year ending with or within the plan year.

Many commentators observed that § 1.401(k)–1(a)(6)(iii) of the 1988 proposed regulations had the effect of treating all matching contributions on behalf of partners as elective contributions. Under that provision, a matching contribution on behalf of a partner was treated as an elective contribution if the partnership deduction for the contribution was allocated to the partner. Section 1.404(e)–1A(f) of the regulations, however, requires that a partnership allocate the deduction for all contributions to a defined contribution plan on behalf of a partner to that partner. Accordingly, under the 1988 proposed regulations it was impossible for a partnership to make a matching contribution on behalf of a partner without having the contribution treated as elective.

This result was not intended. The Treasury and the Service agree that partnership CODAs should be permitted to contain matching contributions for partners that are not treated as elective deferrals, but continue to believe that a matching contribution that is deducted solely by the partner who benefits from it is properly characterized as an elective contribution.

One commentator suggested that § 1.404(e)–1A(f) of the regulations be amended to allow matching and other contributions on behalf of a partner to be made and deducted by partners other than the partner to whose plan account the contributions are allocated. This proposal has received serious consideration by the Treasury and the Service.

Developing additional deduction rules for matching and other contributions by partners raises a number of significant issues involving the interaction of plan qualification and partnership rules. One issue is whether alternative methods are appropriate for determining a partner's distributive share of contributions on behalf of partners, and deductions for these contributions. A second issue is whether some or all qualified plan contributions on behalf of partners should be treated as guaranteed payments under section 707(a). In addressing these issues, consideration must, of course, be given to the appropriate implementation of the deduction limitations of section 404 in the partnership context, and to the effect of the alternative methods on the determination of the partner's earned income under section 401(c)(2).

Because of the complexity of these issues, no change in § 1.404(e)–1A(f) of the regulations is made at the present time. However, comments are specifically requested concerning appropriate changes to § 1.404(e)–1A(f) and related regulations.

3. Aggregation Rules

a. Employee Stock Ownership Plans (ESOPs)

There were numerous comments on the provisions in the 1988 proposed regulations requiring disaggregation of qualified CODAs with employee stock ownership plans (ESOPs). A number of commentators questioned the requirement in § 1.401(k)–1(b)(5)(ii) of the 1988 final regulations, and § 1.401(m)–1(b)(4)(ii) of the 1988 proposed regulations, that ESOPs be tested separately from other plans. Since an ESOP and a CODA may each be part of a plan, these commentators argued that they may be parts of the same plan and should be allowed to be tested together. The separate testing rule also raised questions concerning the availability of the special CODA nondiscrimination rules to ESOPs.

The final regulations continue to require that the ESOP and the non-ESOP portion of a CODA be tested separately, as provided in the 1988 regulations. After carefully reviewing the relevant provisions of the statute, legislative history, and regulations, the Treasury and the Service continue to believe that Congress did not intend to permit ESOPs and other plans to be aggregated for purposes of the ADP and ACP tests.

Mandatory disaggregation of ESOPs from other plans is consistent with congressional endorsement of the separate testing rule in § 54.4975–11(e)

with respect to the nondiscrimination requirements of the Code, H.R. Rep. No. 1515, 94th Cong., 2d Sess. 541 (1976) (Conference Report); see also H.R. Rep. No. 841, 99th Cong., 2d Sess. II–411 n.1 (1986) (Conference Report). Because mandatory disaggregation has the effect of requiring participation by nonhighly compensated employers in the ESOP, it is also consistent with the longstanding congressional objective of encouraging widespread employee stock ownership through ESOPs, see H.R. Rep. No. 1515, 94th Cong., 2d Sess. 541–42 (1976) (Conference Report); S. Rep. No. 36, 94th Cong., 1st Sess. 58 (1975); see also S. Rep. No. 1263, 95th Cong., 2d Sess. 79 (1978); S. Rep. No. 938, 94th Cong., 2d Sess., Part I, at 180 (1976).

Commentators also argued that mandatory disaggregation of ESOPs is inconsistent with the requirement in section 401 (k)(3)(A) and (m)(2)(B) that the ADP and ACP of a highly compensated employee be calculated by aggregating all CODAs or plans in which the employee participates. Aggregation of deferrals and contributions with respect to highly compensated employees participating in both an ESOP and the rest of a plan would, however, generally increase the disparity between the ADP and ACP of highly and nonhighly compensated employees. This is because deferrals and contributions of highly compensated employees under both portions of the plan would be taken into account, whereas only deferrals or contributions under the portion being tested would be taken into account for nonhighly compensated employees.

Commentators suggested that, if mandatory disaggregation were retained, an exception be added to the general aggregation rule for CODAs in which a highly compensated employee participates. In other words, if a highly compensated employee participated in both the ESOP and non-ESOP portion of a CODA, the ADP for the ESOP portion would be calculated by taking into account only the elective contributions and amounts treated as elective contributions under the ESOP portion of the CODA. The ADP for the non-ESOP portion would be calculated by taking into account only the elective contributions and amounts treated as elective contributions under the non-ESOP portion of the CODA. In both cases, the total compensation taken into account under both portions of the CODA would be used in calculating the ADP. The regulations adopt this suggestion. The regulations do not require aggregation in this limited case because the legislative history of section 401 (k)(3)(B) and (m)(2)(B) does not suggest that Congress intended a marked departure from past practice in providing these aggregation rules.

Some practitioners have asked whether the separate testing rule for the ESOP and non-ESOP portions of a plan subject to section 401 (k) or (m) permits multiple use of the 200 percent/two percentage point alternative method of satisfying the ADP and ACP tests. Under this approach, the multiple use limitation of section 401(m)(9) would first be applied to elective, employee, and matching contributions under the ESOP portions of the plans in which highly compensated individuals participated. It would then be applied separately to the non-ESOP portions of those plans. The final regulations clarify that the multiple use limitation, like the ADP and ACP tests, is applied separately to the ESOP and non-ESOP portions of the plans.

The final regulations do not address a number of significant issues that may affect ESOPs that include elective deferrals, employee contributions, or matching contributions. For example, they do not address issues relating to the treatment of dividends described in section 404 (k) for purposes of section 401 (k) and (m). The Treasury and the Service have opened a regulations project relating to the interaction of sections 404 (k) and 401 (k) and (m) and intend to address these issues in the near future. Other ESOP nondiscrimination issues will also be addressed in future regulations. No inference should be drawn from the fact that an issue is not addressed in this document or from the fact that only certain aspects of an issue are addressed.

b. Plans Maintained by More Than One Employer and Collectively Bargained Plans

The treatment of multiemployer and multiple employer plans under section 401 (k) and (m) has been clarified in §§ 1.401(k)–1(b)(3)(ii)(B) and (iv) and 1.401(m)–1(b)(3)(ii). Under the final regulations, the ACP test applies to a collectively bargained plan to which section 413(b) applies as if all participants were employed by a single employer. The ADP and ACP tests apply to a plan maintained by more than one employer to which section 413(c) applies as if each employer maintained a separate plan.

Some commentators have questioned whether the ADP and ACP tests must be satisfied by collectively bargained plans. Proposed Reg. § 1.401(a)(4)–1(c)(6) provides that a collectively bargained plan (or portion of a plan) automatically satisfies the nondiscrimination requirements of section 401(a)(4). Similarly Proposed Reg. § 1.410(b)–6(e) provides that a collectively bargained plan (or portion of a plan) automatically satisfies the coverage requirements of section 410(b). Some commentators have suggested that, since the ADP and ACP tests are special tests for nondiscrimination in contributions or benefits, a collectively bargained plan (or portion of a plan) should not be required to satisfy the ADP and ACP tests.

The final regulations clarify that a collectively bargained plan (or portion of a plan) need not satisfy the ADP or ACP test to be nondiscriminatory. However, the ADP test is part of the definition of a qualified CODA. See section 401(k)(3)(A). An elective contribution by an employee under a nonqualified CODA is includible in the employee's gross income. Sections 1.401(k)–1(a)(5)(iii) and 1.402(a)–1(d). Therefore, while a CODA that is part of a collectively bargained plan and that does not satisfy the ADP test is treated as nondiscriminatory for purposes of section 401(a)(4), the elective contributions under the arrangement are includible in the employees' gross incomes, since the CODA is not a qualified CODA.

The final regulations make prospective the income inclusion of elective contributions under a nonqualified CODA that is part of a collectively bargained plan, provided it satisfies the requirements of section 401(k) other than the ADP test. Thus, for plan years beginning before January 1, 1993, these CODAs are treated as qualified CODAs for purposes of determining whether the elective contributions are includible in gross income. Sections 1.401(k)–1(a)(7) and 1.402(a)–1(d)(3)(iv). This means that elective contributions under the collectively bargained CODA may be excluded from employees' gross incomes even though the plan fails the ADP test for plan years beginning before January 1, 1993. However, for taxable years after 1986 the section 402(g) dollar limit on the exclusion of elective deferrals applies as it would to a qualified CODA.

c. Definition of Plan and Plan Aggregation

The 1988 proposed and final regulations included rules governing which arrangements may be aggregated for purposes of section 401(k) and (m). These rules generally required consistency with the aggregation of plans for purposes of sections 401(a)(4) and 410(b). Thus, all CODAs in a group

of plans treated as a single plan for purposes of sections 401(a)(4) and 410(b) were required to be treated as a single arrangement for purposes of section 401(k), and the plans were required to be aggregated for purposes of section 401(m). Conversely, if two plans were not aggregated for purposes of sections 401(a)(4) and 410(b), they were required to be treated separately under section 401 (k) and (m). The 1988 regulations also provided that contributions and allocations under an ESOP could not be combined with any other contributions and allocations for purposes of applying sections 401 (a)(4), (k), (m), or 410(b). Also, for plan years beginning after December 31, 1989, plans could be aggregated only if they had the same plan year.

On May 18, 1989, proposed regulations under section 410(b) were published in the **Federal Register** (54 FR 21437). Section 1.410(b)–7 of these proposed regulations defined "plan" and provided rules governing plan aggregation and disaggregation. In addition to requiring the disaggregation of ESOPs from other contributions and allocations, the proposed regulations required disaggregation of plans (or portions of a plan) benefiting collective bargaining unit employees from other plans (or portions of the same plan), plans including qualified CODAs, plans including employee or matching contributions, certain plans benefiting otherwise excludable employees, plans of separate lines of business, and certain plans maintained by more than one employer.

On May 14, 1990, and September 14, 1990, the Treasury and the Service published comprehensive proposed nondiscrimination regulations for qualified plans under sections 401(a)(4) and 410(b) (55 FR 19897 and 55 FR 37888). These proposals supplemented the regulations proposed on May 18, 1989, to provide a coordinated set of nondiscrimination rules for qualified plans. The intent of the regulations published under sections 401(a)(4) and 410(b) was that the principles they enunciated would apply as well to section 401 (k) and (m). Accordingly, these final regulations include definitions of a number of terms that are in most respects identical to the rules previously proposed under section 410(b).

The final regulations clarify that, consistent with the requirements of sections 401(a)(4) and 410(b) and the regulations thereunder, the requirements of section 401 (k) and (m) are applied separately to separate plans as defined under section 414(l), taking into account the mandatory disaggregation and permissive aggregation rules under section 410(b). (However, the portion of a plan that includes elective contributions, and the portion of the plan that includes employee and matching contributions need not be disaggregated for purposes of these regulations.) No inference should be drawn from the definition of the term "plan" contained in these regulations concerning how this term may be defined in final regulations under section 410(b). It is anticipated, however, that when final regulations are issued under section 410(b), these regulations will be revised to cross-refer to definitions of common applicability under sections 410(b), 401(k), and 401(m).

d. Restructuring

Section 1.401(a)(4)–9 of the regulations proposed on May 14, 1990, permitted plans to be restructured into component plans that separately satisfy sections 401(a)(4) and 410(b). These rules were intended to permit employers to provide benefits under one plan that otherwise could be provided only under multiple plans. Section 1.401(a)(4)–9, as proposed on May 14, 1990, provided that plans subject to section 401 (k) or (m) could be restructured on the basis of employee groups, but could not use the total rate or rate segment methods of restructuring. The preamble to the regulations proposed on September 14, 1990, announced that more objective limits on restructuring plans subject to section 401 (k) or (m) were being considered, and requested comments on possible limitations. The preamble stated that pending publication of future regulations, plans subject to section 401 (k) or (m) could be restructured on the basis of employee groups as provided in the proposed regulations. Examples were provided of situations where employees shared the requisite common attributes to allow them to be treated as employee groups for purposes of restructuring.

After considering comments received on appropriate restructuring rules for plans subject to sections 401 (k) and (m), the Treasury and the Service have concluded that it is inappropriate for these plans to use restructuring. The statutory language of sections 401 (k) and (m) indicates that the ADP and ACP tests are to be applied, and appropriate corrections are to be made, on a plan-wide basis. In addition, restructuring dilutes employer incentives to encourage participation by nonhighly compensated employees, and may increase the individual disparities in deferrals and contributions that would otherwise be permitted under the ADP and ACP tests. For these reasons, the use of restructuring to satisfy sections 401 (k) and (m) is not permitted for plan years beginning after December 31, 1991. For plan years beginning before January 1, 1992, plans subject to sections 401 (k) and (m) may be restructured on the basis of employee groups as permitted under the regulations proposed on May 14, 1990, as further explained in the preamble to the regulations proposed on September 14, 1990.

4. Distributions

The distribution provisions in the 1988 regulations were largely organized on the basis of the effective dates applicable to various types of distributions. In order to simplify the regulations, these provisions have been substantially reorganized in the final regulations to consolidate all provisions dealing with a particular type of distribution, such as distributions upon plan termination. The reorganization is intended to simplify the regulations, not to change their substance. Changes in the provisions that apply to various types of distributions are described in the following paragraphs.

a. Distributions Upon Plan Termination

Tax Reform Act of 1986 amended section 401(k)(2)(B)(i)(II) to permit distributions from a qualified CODA after the termination of the plan without establishment of a successor plan, effective for plan years beginning after December 31, 1984. The 1988 proposed regulations (§ 1.401(k)–1(d)(1) (ii)(B) and (iii)(B)) defined a successor plan as any other defined contribution plan (other than an ESOP) maintained or established by the employer at the time the plan including the CODA was terminated or within 12 months after distribution of all assets from the CODA. Under the 1988 proposed regulations, if a successor plan existed, the CODA making the distribution did not satisfy section 401(k) and the successor plan was disqualified.

A number of commentators criticized the definition of the term "successor plan" in the 1988 proposed regulations as overbroad. They observed that problems could arise where employers merged, since a plan of a previously unrelated employer could then become a successor plan even though it covered none of the same employees. Similarly, a plan of another member of the employer's controlled group in a different business could be a successor plan and prevent the distribution of benefits upon termination of the plan containing the qualified CODA. Some

commentators suggested solving these problems by providing that a defined contribution plan is not a successor of a plan (including a CODA) if there is no overlap in the eligible employees under the two plans. Many argued that only a plan including a CODA should be a successor plan. Commentators also criticized disqualifying the successor plan under section 401(k) even though the plan might not be subject to that section.

Section 1011(k)(1)(B) of TAMRA enacted Code section 401(k)(10)(A)(i), replacing section 401(k)(2)(B)(i)(II). This codified the definition of a successor plan as any other defined contribution plan (other than an employee stock ownership plan) established or maintained by the employer. As a result, the final regulations could not limit the definition of a successor plan to a plan including a CODA.

In response to comments, the final regulations narrow the definition of a successor plan in several respects, however. First, § 1.401(k)-1(d)(3) of the final regulations provides that if fewer than two percent of the employees who are eligible under the plan that includes the CODA at the time of its termination are eligible under another plan at any time during the 24 months beginning 12 months before the time of the termination, the other plan is not a successor plan. For example, if an employer maintains a plan including a CODA and another defined contribution plan for two distinct groups of employees, and there is no overlap in the employees eligible under the plans, the other defined contribution plan is not a successor plan. Second, the final regulations clarify that a simplified employee pension, as defined in section 408(k), is not a successor plan. Finally, the successor plan is not disqualified by an impermissible distribution from a CODA on plan termination.

b. Hardship Distributions

Many commentators praised the 1988 final regulations for providing safe harbors to determine the existence of an immediate and heavy financial need (§ 1.401(k)-1(d)(2)(ii)(B)) and the necessity of a distribution to satisfy the financial need (§ 1.401(k)-1(d)(2)(iii)(B)). Some, however, requested liberalization or clarification of specific aspects of the deemed hardship rules. Many of their suggestions are reflected in the final regulations.

For example, several commentators stated that the provision in the 1988 final regulations (§ 1.401(k)-1(d)(2)(ii)(B)(*3*)) permitting a hardship distribution for the payment of tuition only for the next semester or quarter was unduly burdensome for employees and plan administrators since it required multiple distributions to cover what amounts to a single hardship. Accordingly, the limitation to payment for the next semester or quarter has been dropped. The final regulations permit a distribution on account of tuition and related educational fees for the next 12 months of post-secondary education.

Clarification of the requirement that medical expenses be "incurred" to be deemed an immediate and heavy financial need was also requested. In response, the safe harbor was modified to allow distribution of amounts necessary for the employee, the employee's spouse, or the employee's dependent to obtain medical services. Unless this standard is met, however, the expenses must be incurred before the deemed hardship distribution is made.

The safe harbor was also modified to clarify that the amount that may be distributed on account of a hardship includes the amount necessary to pay income taxes or penalties resulting from the distribution. Thus, the amount to be distributed for the financial need may be "grossed up" for anticipated federal and state income taxes and penalties.

Several commentators stated that the requirement (one of the conditions for deeming a distribution necessary to satisfy a financial need) that a participant obtain the maximum loan available before taking a hardship distribution could cause less than the participant's entire account balance to be available for alleviating the hardship. This concern stemmed from the requirement in the Department of Labor regulations, at 29 CFR 2550.408b-1(f), that a plan making a participant loan must obtain security of sufficient value that it may be reasonably anticipated that loss of principal or interest will not result from the loan. The commentators believed that this might require that an amount exceeding the amount borrowed serve as security for the loan. This would effectively reduce the amount available to the participant.

This is not necessarily the case. The Department of Labor has informed the Treasury and the Service that, if a plan provides an individual account for each participant, and the investment experience of the assets in that account is allocated solely to that account, any participant who has a vested accrued benefit may borrow up to 50 percent of the present value of the accrued benefit secured by that same 50 percent of the vested account balance. For example, in this type of plan a participant with a vested accrued benefit with a present value of $10,000 may borrow $5,000, secured by 50 percent of the vested account balance, *i.e.*, $5,000, and meet the terms of the Department of Labor regulations at 29 CFR 2550.408b-1(f) (1) and (2). The remaining $5,000 is available for a hardship distribution. See 54 FR 30526. Accordingly, no change has been made in these regulations with respect to the loan requirement.

Section 1.401(k)-1(d)(2)(iv)(A) of the 1988 final regulations provided that a plan does not violate section 411(d)(6) merely because it was amended to modify the standards for hardship distributions to reflect the applicable requirements of the regulations. The 1988 final regulations limited this exception to section 411(d)(6) to amendments effective on or before the first day of the first plan year commencing on or after January 1, 1989. Notice 88-127, 1988-2 C.B. 538, provided that the exception to section 411(d)(6) applied to an amendment adopted within the time period permitted for required amendments to the plan under section 1140 of TRA '86, as extended in the regulations under section 401(b), that was retroactively effective to the date on which the plan began operating in accordance with the standards. Commentators argued that a permanent exception to section 411(d)(6) was needed to enable a plan to adapt to changing needs of employees and employers, changing economic circumstances, and their experience in administering provisions. In response to commentators' suggestions, § 1.411(d)-4, A-2(b)(2), of the regulations has been amended to permit a plan amendment to specify or modify nondiscriminatory and objective standards for determining the existence of an immediate and heavy financial need, the amount necessary to meet the need, or other conditions relating to eligibility to receive a hardship distribution. For example, a plan using the general rules for hardship distributions could replace them with the deeming rules, or could alter (whether to restrict or to relax) its standards for applying the general rules. These changes may be made at any time without violating section 411(d)(6). A plan may also be amended to eliminate hardship distributions.

Many comments suggested additional circumstances that could give rise to a deemed immediate and heavy financial need. In general, the circumstances described depended so heavily on facts and circumstances that they could not be delineated precisely in the list of circumstances qualifying for the safe harbors. In addition, an employer that wishes to allow distributions in circumstances not listed in the deeming

provision may permit distributions under the general hardship rules, by including appropriate language in the plan. The Treasury and the Service therefore decided not to expand the list of deemed immediate heavy and financial needs.

Section 1.401(k)–1(d)(2)(iii)(B)(*3*) of the 1988 final regulations provided that one of the conditions for deeming a hardship distribution necessary to satisfy a financial need is that the employee's elective contributions and employee contributions to the plan and all other plans maintained by the employer be suspended for at least 12 months after receipt of the hardship distribution. Several commentators asked how the Service would interpret the phrase "all other plans of the employer" and requested that the Service clarify the types of plans from which an employee's participation must be suspended after a hardship distribution.

Notice 88–127, 1988–2 C.B. 538, responded to these questions by clarifying that the phrase includes all qualified and nonqualified plans of deferred compensation maintained by the employer, other than the mandatory employee contribution portion of a defined benefit plan. Stock option, stock purchase, and similar plans, as well as a CODA that is part of a cafeteria plan (but not the cafeteria plan itself) are also included in the definition. Health and welfare benefit plans are not included. Several commentators argued that this definition was overbroad, and should not include nonqualified plans. The reason for requiring suspension, however, is that a participant who can continue to defer funds under any type of plan shows evidence of having funds that can be used to meet the financial burden. Since the employer is able to control the participant's access to nonqualified as well as qualified plans, the Treasury and the Service concluded that, to be consistent, the suspension must apply to all these plans. The final regulations therefore incorporate the definition from Notice 88–127.

A number of commentators asked whether it was necessary to amend an employer's plans (other than the one including the CODA) that could be affected by the required suspension of contributions in order to implement the suspension. Section 1.401(k)–1(d)(2)(iii)(B)(*3*) of the 1988 final regulations required that all of these plans provide for the suspension. This requirement has been relaxed in the final regulations, which require only that the employee be prohibited under a legally enforceable arrangement from making elective or employee contributions under the plan and all other plans maintained by the employer for at least 12 months after the hardship distribution. A legally enforceable arrangement might, for example, consist of the employee's written agreement not to make or elect contributions under any plan of the employer for the requisite period, or provisions in all of the affected plans.

c. Default on Loan as Distribution

Section 1.401(k)–1(d)(4) of the 1988 final regulations provided that a reduction of an employee's accrued benefit derived from elective contributions because of a default on a plan loan was a distribution. Thus, under this rule a CODA was disqualified if it permitted a reduction of the accrued benefit before one of the permitted distribution events listed in section 401(k)(2)(B). Commentators correctly observed that this fact could have made plan loans secured solely by a participant's accrued benefit impossible, for proposed Department of Labor regulations treated a participant's vested accrued benefit under a plan as adequately securing a loan only if it could be used to satisfy a participant's outstanding obligation in the event of default.

Since the 1988 final regulations were issued, the Department of Labor has issued final regulations requiring that loans to participants be adequately secured to come within the statutory exemption provided by section 408(b)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and Code section 4975(d)(1). 29 CFR 2550.408b–1. This requirement must be satisfied immediately after the loan is made. 29 CFR 2550.408b–1(f)(2). The Department of Labor regulations provide that up to 50 percent of the present value of a participant's vested accrued benefit may be considered by a plan as security for the outstanding balance on all plan loans to that participant. Thus, where the investment experience on a plan loan is allocated to the borrower's account, a loan of up to 50 percent of the present value of the participant's vested accrued benefit will satisfy the adequate security requirement even if the plan (in compliance with § 1.401(k)–1(d)(6)(i)) may not reduce the participant's account balance upon default until a permitted distribution event occurred.

Most plans do not permit loans of more than 50 percent of the participant's vested accrued benefit, except loans of $10,000 or less, in order to avoid taxation of loans as distributions under section 72(p). With respect to all loans, including those of $10,000 or less secured by a participant's vested accrued benefit, the Department of Labor regulations govern for purposes of determining whether a loan comes within the statutory exemption provided by ERISA section 408(b)(1) and Code section 4975(d)(1). Therefore, the final Department of Labor regulations eliminate the conflict feared by the commentators. Accordingly, the final section 402(k) regulations retain the provision that reduction of an employee's accrued benefit upon a loan default is a distribution. It should be noted that only an actual reduction of the accrued benefit upon default is a distribution for this purpose. As provided in § 1.401(k)–1(d)(6)(ii), the amount of a loan is not a distribution for this purpose even if it is includible in the employee's gross income under section 72(p) (for example, if it is not payable within five years).

5. Other Benefits Not Contingent Upon Elective Deferrals

Section 401(k)(4)(A) and § 1.401(k)–1(e)(6) of the 1988 proposed regulations provide that a CODA does not meet the requirements of section 401(k) if any other benefit (other than a matching contribution described in section 401(m)) is contingent upon the employee's elective deferrals. The 1988 proposed regulations define other benefits as including benefits under various types of nonqualified plans, such as nonqualified deferred compensation plans. Several commentators criticized this aspect of the definition as overbroad. The statutory language, however, is not limited to qualified plans.

The final regulations clarify the definition in two ways suggested by commentators. First, they provide that participation in a nonqualified deferred compensation plan is contingent upon an employee's elective deferrals to the extent that an employee may receive additional deferred compensation under it if the employee makes or does not make elective contributions. For example, an arrangement that allows an employee to defer up to 10 percent of compensation, and to choose between deferring it under a CODA or under a nonqualified deferred compensation plan violates the contingent benefit rule since the maximum deferral under the nonqualified plan depends on the employee's elective deferrals under the CODA. Second, these final regulations clarify that deferred compensation under a nonqualified plan that is dependent on an employee's having made the maximum elective deferrals under section 402(g), the maximum elective contributions under section

401(k)(3), or the maximum elective contributions permitted under the terms of the plan does not violate the contingent benefit rule. Section 1.401(k)–1(e)(6)(iv).

6. Determination of Excess Contributions and Excess Aggregate Contributions.

Section 1.401(k)–1(f)(2) of the 1988 final regulations required the amount of excess contributions (those exceeding the amount permitted by the ADP test) for a highly compensated employee to be determined by a leveling method. Under this method the highest ADP of any highly compensated employee was reduced until either the CODA satisfied the ADP test or the highest ADP of any highly compensated employee was reduced to equal the next highest ADP of any highly compensated employee. This process had to be repeated until the CODA satisfied the ADP test. Proposed Reg. § 1.401(m)–1(e)(2) prescribed an analogous leveling method for determining the amount of excess aggregate contributions (those exceeding the amount permitted by the ACP test).

Several commentators have suggested that the regulations not limit the method used by a plan to determine the amount of excess contributions or excess aggregate contributions of a highly compensated employee. They have observed that, since only highly compensated employees can have excess contributions or excess aggregate contributions, no method could discriminate against the nonhighly compensated employees. Moreover, the leveling method used in the 1988 proposed and final regulations could favor the more highly compensated among the highly compensated employees. This is true because many highly compensated employees make elective deferrals equal to the section 402(g) limit, which is a larger percentage of compensation for a less highly compensated employee. For example, assume that under a calendar year plan two highly compensated employees, with 1991 compensation of $75,000 and $200,000, respectively, elect the maximum elective deferrals of $8,475 each for 1991. If there are no qualified nonelective contributions or qualified matching contributions, the ADP of the $75,000 employee is $8,475/$75,000, or 11.30 percent, while the ADP of the $200,000 employee is $8,475/$200,000, or 4.24 percent. If there were excess contributions for 1991, the leveling method in the 1988 proposed and final regulations would require a larger amount of the $75,000 employee's elective deferrals to be distributed or recharacterized, since it required the plan to allocate excess contributions first to the highly paid employee with the highest ADP.

The leveling method in the 1988 proposed and final regulations is compelled by the statute. Section 401(k)(8)(B)(ii), defining "excess contributions," provides that they must be "determined by reducing contributions made on behalf of highly compensated employees in order of the actual deferral percentages beginning with the highest of such percentages." Section 401(m)(6)(B)(ii) uses analogous language in defining "excess aggregate contributions." The House Ways and Means Committee Report on the Tax Reform Act of 1986 includes an example of this leveling method that implies that it is the exclusive method. See H.R. Rep. No. 426, 99th Cong., 1st Sess. 691–92 (1985); see also H.R. Rep. No. 841, 99th Cong., 2d Sess. II–383, 388 (1986) (Conference Report).

Accordingly, the leveling method in the regulations has not been modified, and remains the exclusive method for plans to use in determining excess contributions or excess aggregate contributions. The leveling method is required, however, only where excess contributions or excess aggregate contributions have been made and are to be distributed, recharacterized, or forfeited. A plan may use a different method to adjust participant elections before contributions are made to prevent excess contributions or excess aggregate contributions from occurring.

7. Allocation of Income to Excess Contributions, Excess Aggregate Contributions, and Excess Deferrals

The 1988 proposed regulations (§§ 1.401(k)–1(f)(4)(ii), 1.401(m)–1(e)(3)(ii), and 1.402(g)–1(d)(5)) prescribed a specific method for allocating income to excess contributions, excess aggregate contributions, and excess deferrals that were distributed or recharacterized. That method allocated income in proportion to the ratio of the excess amounts to the relevant portion of the employee's account balance as of the end of the plan year (without regard to gain or loss during the plan year). For example, under that method the income allocable to excess contributions for a plan year was determined by multiplying the income allocable to elective contributions and amounts treated as elective contributions by the ratio of the excess contributions to the employee's account balance as of the end of the plan year attributable to elective contributions and amounts treated as elective contributions, reduced by gain and increased by loss allocable to the total amount during the plan year.

Many commentators considered the method too restrictive, since plans often allocate income to participants' accounts more precisely. They also said that the 1988 proposed regulations' method was not consistent with normal plan accounting and therefore imposed an unnecessary administrative burden on plans, which were effectively forced to calculate the allocable income twice, first in their normal manner, and then in the manner prescribed by the 1988 proposed regulations.

In addition to the methods described in the proposed regulations, the final regulations permit plans to use any reasonable method they otherwise use for allocating income to participants' accounts. As suggested by commentators, final regulations also simplify the allocation of income by making it permissive, rather than mandatory, to allocate income for the gap period (the period from the end of the plan year to the date of distribution).

8. Period for Determining Compensation

Sections 1.401(k)–1(g)(9)(ii) and 1.401(m)–1(f)(14) of the 1988 proposed regulations provided in general that a plan must take into account all compensation of a participant for the plan year for purposes of the ADP and ACP tests, even if the employee was eligible to participate in the CODA, to make employee contributions, or to have matching contributions made to the employee's account for only part of the plan year. Section VI of Notice 88–127, 1988–2 C.B. 538, stated that final regulations would be amended to allow a plan to limit compensation taken into account to compensation received by an employee while the employee was a participant, for plan years beginning before January 1, 1990. Rev. Proc. 89–65, 1989–2 C.B. 786, extended this temporary rule to allow a plan to limit compensation to the amount received while the employee was a participant for plan years beginning before the later of January 1, 1992, or the date that is 60 days after publication of final regulations.

A number of commentators suggested that this temporary rule be made permanent because, in the case of defined contribution plans, it is consistent with the principle of nondiscrimination to measure compensation by reference to the portion of the plan year during which an employee is a plan participant. The Treasury and the Service agree. On September 14, 1990, proposed regulation

§ 1.401(a)(4)–2(f) was revised to allow plans to take into account for discrimination testing only compensation received by the employee while a plan participant. The final regulations apply this principle to section 401 (k) and (m) by providing that compensation may be determined for the same period described in Proposed Reg. § 1.401(a)(4)–2(f). Thus, a plan may provide that the ADP or ACP test is applied using the compensation received by an employee while eligible to participate in the CODA, to make employee contributions, or to have matching contributions made on the employee's behalf. Alternatively, a plan may calculate compensation for a plan year based on the calendar year ending within the plan year.

9. Effective Date for Applying the Actual Deferral Percentage and Actual Contribution Percentage Tests to Governmental Plans

Section 1.401(m)–1(g)(4) of the final regulations provides that the ACP test does not apply to governmental plans described in section 414(d) for plan years beginning before January 1, 1993. For the same period, § 1.401(k)–1(h)(4)(ii) provides that a governmental plan need not satisfy the ADP test to be considered nondiscriminatory. The modified effective date is the same as the end of the transition rule provided for governmental plans for applying the general nondiscrimination rules (Proposed Reg. § 1.401(a)(4)–13(b)).

Although elective contributions may be excluded from gross income only if made under a qualified CODA, CODAs under governmental plans will be treated as qualified CODAs during this transition period even though the plan fails the ADP test. However, for taxable years beginning after December 31, 1986, the dollar limit on the exclusion of elective deferrals applies as it would to a qualified CODA. Of course, the transitional relief applies only to a governmental unit that adopted a CODA before May 7, 1986, and is therefore permitted to maintain one. See section 401(k)(4)(B) and § 1.401(k)–1(e)(4) of the final regulations.

10. Correction of Excess Annual Additions Under Section 415

Many commentators have asked how excess annual additions under section 415(c) may be corrected if they consist of elective contributions. In response to their suggestions, § 1.415–6(b)(6) of the regulations has been amended to provide a simple method of correcting elective contributions that (in combination with other contributions) exceed the limits of section 415. As amended, the regulations allow plans to distribute elective contributions to correct excess annual additions resulting from a reasonable error in determining the amount of elective deferrals that a participant may make under the limits of section 415.

11. Reduction of Excess Accrued Benefits Under a Defined Benefit Plan

Section 1106 of TRA '86 revised the method of computing the limitations of section 415 for defined benefit plans. Although section 1106(i)(1) provides that the amendments to section 415 are generally effective for limitation years beginning after December 31, 1986, section 1106(i)(3) protects the "current accrued benefit" for any individual who was a participant in a defined benefit plan as of the first day of the first TRA '86 limitation year, provided the plan existed on May 6, 1986, and satisfied the applicable section 415 limits for all pre-TRA '86 limitation years. The protected accrued benefit is the participant's accrued benefit as of the last pre-TRA '86 limitation year determined without regard to changes in the terms and conditions of the plan or cost-of-living increases occurring after May 5, 1986.

Q&A 13 of Notice 87–21, 1987–1 C.B. 458, acknowledged that accrued benefits on the first day of the first TRA '86 limitation year might exceed the 415 limits because of the changes in the terms or conditions of the plan or the establishment of a plan after May 5, 1986. The Notice announced that "future regulations will provide that such plans will be allowed to reduce such excess accrued benefits to the level permitted under TRA '86 without violating section 411(d)(6) of the Code." Section 1.411(d)–4, A–2(b)(2) is amended to permit reduction of the excess accrued benefits to the section 415(b) limit.

Other Actions Taken

Other changes in style and organization have been made in order to improve, clarify, and resolve areas that commentators noted as being ambiguous.

Effective Dates

These regulations are generally effective for plan years beginning after December 31, 1979. Those portions of the regulations relating to amendments made by the Tax Reform Act of 1986 are generally effective for years beginning after December 31, 1986. There are special effective date rules for plans maintained pursuant to collective bargaining agreements. In addition, portions of these regulations become applicable to various taxpayers and plans as of dates other than the general effective date.

For plan years beginning after December 31, 1987, and before January 1, 1992, a plan may rely on a reasonable interpretation of the rules set forth in section 401 (k) and (m) (as in effect during those years) to determine whether a plan or a CODA was qualified during those years. For those years, operation in accordance with the proposed and final regulations published in the **Federal Register** on August 8, 1988, 53 FR 29658 and 29719, as amended on May 14, 1990 (55 FR 19897), is a reasonable interpretation of those sections.

For plan years beginning after December 31, 1979 (or, in the case of a pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1988, a reasonable interpretation of the rules set forth in section 401 (k) and (m) (as in effect during those years) may be relied upon to determine whether a plan or a CODA was qualified during those years. For those years, and with respect to hardship distributions made before April 1, 1989, operation in accordance with the proposed regulations published in the **Federal Register** on November 10, 1981, 46 FR 55544, is a reasonable interpretation of those sections.

Plan Amendments

Plan sponsors may defer amendments required by these regulations until the earlier of plan termination or the last date for making amendments provided by section 1140 of the Tax Reform Act of 1986, as extended in the regulations under section 401(b). The Commissioner has extended the remedial amendment period for making amendments required by the Tax Reform Act of 1986 until the last day of the first plan year beginning after December 31, 1991. To be eligible for this extended remedial amendment period, a plan must be operated in accordance with the regulations beginning on their applicable effective dates with respect to the plan. Rev. Proc. 89–65, 1989–2 C.B. 786 (section 3), as modified by Notice 90–73, 1990–2 C.B. 353 (section III).

Amendments may be made until the later of the end of this extended remedial amendment period, or the date the remedial amendment period would have ended if it had not been extended. In general, the remedial amendment period would end on the last date prescribed by law, including extensions, for filing the income tax return of the employer for the employer's taxable year in which the date of the remedial amendment period begins. If a

determination letter is requested during the remedial amendment period, the required plan amendments must be adopted no later than ninety days after receipt of a favorable determination letter.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the proposed regulations published after November 20, 1988, were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Catherine Livingston Fernandez of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Treasury and the Service participated in their development.

List of Subjects

26 CFR Part 1 (1.401–0—1.419A–2T)

Bonds, Employee Benefit Plans, Income Taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 54, and 602 are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 continues to read in part:

Authority: 26 U.S.C. 7805 * * *.

Paragraph 2. Section 1.401(a)–30 is added to read as follows:

§ 1.401(a)–30 Limit on elective deferrals.

(a) *General Rule.* A trust that is part of a plan under which elective deferrals may be made during a calendar year is not qualified under section 401(a) unless the plan provides that the elective deferrals on behalf of an individual under the plan and all other plans, contracts, or arrangements of the employer maintaining the plan may not exceed the applicable limit for the individual's taxable year beginning in the calendar year. A plan may incorporate the applicable limit by reference. In the case of a plan maintained by more than one employer to which section 413 (b) or (c) applies, section 401(a)(30) and this section are applied as if each employer maintained a separate plan. See § 1.402(g)–1(e) for rules permitting the distribution of excess deferrals to prevent disqualification of a plan or trust for failure to comply in operation with section 401(a)(30).

(b) *Definitions.* For purposes of this section:

(1) *Applicable limit.* The term "applicable limit" has the meaning provided in § 1.402(g)–1(d).

(2) *Elective deferrals.* The term "elective deferrals" has the meaning provided in § 1.402(g)–1(b).

(c) *Effective date*—(1) *In general.* Except as otherwise provided in this paragraph (c), this section is effective for plan years beginning after December 31, 1987.

(2) *Transition rule.* For plan years beginning in 1988, a plan may rely on a reasonable interpretation of the law as in effect on December 31, 1987.

(3) *Deferrals under collective bargaining agreements.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, this section does not apply to contributions made pursuant to a collective bargaining agreement for plan years beginning before the earlier of:

(i) The later of January 1, 1988, or the date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986), or

(ii) January 1, 1989.

Paragraph 3. Sections 1.401(k)–0 and 1.401(k)–1 are revised to read as follow:

§ 1.401(k)–0 Certain cash or deferred arrangements, table of contents.

This section contains the captions that appear in § 1.401(k)–1.

§ 1.401(k)–1 Certain cash or deferred arrangements.

(4) Elective contributions taken into account under the actual deferral percentage test.
(i) General rule.
(ii) Elective contributions used to satisfy actual contribution percentage test.
(iii) Elective contributions for partners.
(iv) Elective contributions not taken into account.
(5) Qualified nonelective contributions and qualified matching contributions that may be taken into account under the actual deferral percentage test.
(6) Examples.
(c) Nonforfeitability requirement.
(1) General rule.
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(d) Distribution limitation.
(1) General rule.
(2) Rules applicable to hardship distributions.
(i) Distribution must be on account of hardship.
(ii) Limit on distributable amount.
(iii) General hardship distribution standards.
(A) Immediate and heavy financial need.
(B) Distribution necessary to satisfy financial need.
(iv) Deemed hardship distribution standards.
(A) Deemed immediate and heavy financial need.
(B) Distribution deemed necessary to satisfy financial need.
(C) Commissioner may expand standards.
(3) Rules applicable to distributions upon plan termination.
(4) Rules applicable to distributions upon sale of assets or subsidiary.
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(iv) Definitions.
(A) Substantially all.
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(5) Lump sum requirement for certain distributions.
(6) Rules applicable to all distributions.
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(ii) Deemed distributions.
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(iv) Limitations apply after transfer.
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(e) Additional requirements for qualified cash or deferred arrangements.
(1) Qualified profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan requirement.
(2) Cash availability requirement.
(3) Separate accounting requirement.
(i) General rule.
(ii) Failure to satisfy separate accounting requirement.
(4) Limitations on cash or deferred arrangements of state and local governments and tax-exempt organizations.
(5) One-year eligibility requirement.
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(ii) Definition of other benefits.
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(iv) Nonqualified deferred compensation.
(v) Plan loans and distributions.
(7) Coordination with other plans.
(8) Recordkeeping requirements.
(f) Correction of excess contributions.
(1) General rule.
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(ii) Combination of correction methods.
(iii) Impermissible correction methods.
(iv) Partial distributions.
(2) Amount of excess contributions.
(3) Recharacterization of excess contributions.
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(ii) Treatment of recharacterized excess contributions.
(iii) Additional rules.
(A) Time of recharacterization.
(B) Employee contributions must be permitted under plan.
(C) Plans under which excess contributions may be recharacterized.
(iv) Transition rules.
(v) Example.
(4) Corrective distribution of excess contributions (and income).
(i) General rule.
(ii) Income allocable to excess contributions.
(A) General rule.
(B) Method of allocating income.
(C) Alternative method of allocating income.
(D) Safe harbor method of allocating gap period income.
(iii) No employee or spousal consent required.
(iv) Treatment of corrective distributions as employer contributions.
(v) Tax treatment of corrective distributions.
(A) General rule.
(B) Rule for de minimis distributions.
(C) Rule for certain 1987 and 1988 excess contributions.
(vi) No reduction of required minimum distribution.
(5) Rules applicable to all corrections.
(i) Coordination with distribution of excess deferrals.
(A) In general.
(B) Treatment of excess contributions that reduce excess deferrals.
(ii) Correction of family members.
(iii) Matching contributions forfeited because of excess deferral or contribution.
(6) Failure to correct.
(i) Failure to correct within 2½ months after end of plan year.
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(ii) Actual deferral ratio.
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(B) Employee eligible under more than one arrangement.
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(A) General rule.
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(3) Elective contributions.
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(i) General rule.
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(6) Employer.
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(ii) Excess deferrals.
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(ii) Plan years beginning before January 1, 1993.
(iii) Collectively bargained plans.

§ 1.401(k)-1 Certain cash or deferred arrangements.

(a) *General rules*—(1) *Certain plans permitted to include cash or deferred arrangements.* A plan, other than a

profit-sharing, stock bonus, pre-ERISA money purchase pension or rural cooperative plan, does not satisfy the requirements of section 401(a) if the plan includes a cash or deferred arrangement. A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a cash or deferred arrangement. A cash or deferred arrangement is part of a plan for purposes of this section if any contributions to the plan, or accruals or other benefits under the plan, are made or provided pursuant to the cash or deferred arrangement.

(2) *Rules applicable to cash or deferred arrangements generally*—(i) *Definition of cash or deferred arrangement.* Except as provided in paragraph (a)(2)(ii) of this section, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a) (including a contract that is intended to satisfy the requirements of section 403(a)).

(ii) *Treatment of after-tax employee contributions.* A cash or deferred arrangement does not include an arrangement under which amounts contributed under a plan at an employee's election are designated or treated at the time of contribution as after-tax employee contributions (e.g., by reporting the contributions as taxable income subject to applicable withholding requirements). See also section 414(h)(1). This is the case even if the employee's election to make after-tax employee contributions is made before the amounts subject to the election are currently available to the employee.

(iii) *Treatment of elective contributions as plan assets.* The extent to which elective contributions under a cash or deferred arrangement constitute plan assets for purposes of the prohibited transaction provisions of section 4975 of the Internal Revenue Code and title I of the Employee Retirement Income Security Act of 1974 is determined in accordance with regulations and rulings issued by the Department of Labor.

(3) *Rules applicable to cash or deferred elections generally*—(i) *Definition of cash or deferred election.* A cash or deferred election is any election (or modification of an earlier election) by an employee to have the employer either—

(A) provide an amount to the employee in the form of cash or some other taxable benefit that is not currently available, or

(B) contribute an amount to a trust, or provide an accrual or other benefit, under a plan deferring the receipt of compensation.

A cash or deferred election includes a salary reduction agreement between an employee and employer under which a contribution is made under a plan only if the employee elects to reduce cash compensation or to forgo an increase in cash compensation.

(ii) *Requirement that amounts not be currently available.* A cash or deferred election can only be made with respect to an amount that is not currently available to the employee on the date of the election. Further, a cash or deferred election can only be made with respect to amounts that would (but for the cash or deferred election) become currently available after the later of the date on which the employer adopts the cash or deferred arrangement or the date on which the arrangement first becomes effective.

(iii) *Amounts currently available.* Cash or another taxable amount is currently available to the employee if it has been paid to the employee or if the employee is able currently to receive the cash or other taxable amount at the employee's discretion. An amount is not currently available to an employee if there is a significant limitation or restriction on the employee's right to receive the amount currently. Similarly, an amount is not currently available as of a date if the employee may under no circumstances receive the amount before a particular time in the future. The determination of whether an amount is currently available to an employee does not depend on whether it has been constructively received by the employee for purposes of section 451.

(iv) *Certain one-time elections not treated as cash or deferred elections.* A cash or deferred election does not include a one-time irrevocable election upon an employee's commencement of employment with the employer or upon the employee's first becoming eligible under any plan of the employer, to have contributions equal to a specified amount or percentage of the employee's compensation (including no amount of compensation) made by the employer on the employee's behalf to the plan and to any other plan of the employer (including plans not yet established) for the duration of the employee's employment with the employer, or in the case of a defined benefit plan to receive accruals or other benefits (including no benefits) under such plans. Thus, for example, employer contributions pursuant to a one-time irrevocable election described in this paragraph are not treated as having been made pursuant to a cash or deferred election and are not includible in an employee's gross income by reason of § 1.402(a)–1(d). See paragraph (a)(6)(ii)(C) of this section for an additional one-time election permitted under a cash or deferred arrangement in which partners may participate.

(v) *Tax treatment of employees.* An amount generally is includible in an employee's gross income for the taxable year in which the employee actually or constructively receives the amount. But for section 402(a)(8) and section 401(k), an employee is treated as having received an amount that is contributed to a plan pursuant to the employee's cash or deferred election. This is the case even if the election to defer is made before the year in which the amount is earned, or before the amount is currently available. See § 1.402(a)–1(d).

(vi) *Examples.* The provisions of this paragraph (a)(3) are illustrated by the following examples:

Example 1. An employer maintains a profit-sharing plan under which each eligible employee has an election to defer an annual bonus payable on January 30 each year. The bonus equals 10 percent of compensation during the previous calendar year. Deferred amounts are not treated as after-tax employee contributions. The bonus is currently available on January 30. An election made prior to January 30 to defer all or part of the bonus is a cash or deferred election, and the bonus deferral arrangement is a cash or deferred arrangement.

Example 2. An employer maintains a profit-sharing plan under which each eligible employee may elect to defer up to 10 percent of compensation for each payroll period during the plan year. An election to defer compensation for a payroll period is a cash or deferred election if the election is made prior to the date on which the compensation is to be paid to the employee and if the deferred amount is not treated as an after-tax employee contribution at the time of deferral.

(4) *Rules applicable to qualified cash or deferred arrangements*—(i) *Definition of qualified cash or deferred arrangement.* A qualified cash or deferred arrangement is a cash or deferred arrangement that satisfies the requirements of paragraphs (b), (c), (d), and (e) of this section and that is part of a plan that otherwise satisfies the requirements of section 401(a).

(ii) *Treatment of elective contributions as employer contributions.* Except as provided in paragraph (f) of this section, elective contributions under a qualified cash or deferred arrangement

are treated as employer contributions. Thus, for example, elective contributions are treated as employer contributions for purposes of sections 401(a) and 401(k), 402(a), 404, 409, 411, 412, 415, 416, and 417.

(iii) *Tax treatment of employees.* Except as provided in section 402(g) and paragraph (f) of this section, elective contributions under a qualified cash or deferred arrangement are neither includible in an employee's gross income at the time the cash or other taxable amounts would have been includible in the employee's gross income (but for the cash or deferred election), nor at the time the elective contributions are contributed to the plan. See § 1.402(a)–1(d)(2)(i).

(iv) *Application of nondiscrimination requirements to plan that includes a qualified cash or deferred arrangement.* A plan that includes a qualified cash or deferred arrangement must satisfy the requirements of section 401(a)(4). Thus, for example, the plan must satisfy section 401(a)(4) with respect to the amount of contributions or benefits and the availability of benefits, rights and features under the plan. The right to make each level of elective contributions under a cash or deferred arrangement is a benefit, right or feature subject to this requirement, and each of these rights must therefore generally be available to a group of employees that satisfies section 410(b). Thus, for example, if all employees are eligible to make a stated level of elective contributions under a cash or deferred arrangement, but that level of contributions can only be made from compensation in excess of a stated amount, such as the Social Security taxable wage base, the arrangement will generally favor highly compensated employees with respect to the availability of elective contributions and thus will generally not satisfy the requirements of section 401(a)(4). For plan years beginning after December 31, 1984, the amount of elective contributions under a qualified cash or deferred arrangement satisfies the requirements of section 401(a)(4) only if the amount of elective contributions satisfies the special nondiscrimination test of section 401 (k)(3) and paragraph (b)(2) of this section.

(5) *Rules applicable to nonqualified cash or deferred arrangements*—(i) *Definition of nonqualified cash or deferred arrangement.* A nonqualified cash or deferred arrangement is a cash or deferred arrangement that is not a qualified cash or deferred arrangement. Thus, if a cash or deferred arrangement fails to satisfy one or more of the requirements in paragraph (b), (c), (d) or (e) of this section, the arrangement is a nonqualified cash or deferred arrangement.

(ii) *Treatment of elective contributions as employer contributions.* Except as specifically provided otherwise, elective contributions under a nonqualified cash or deferred arrangement are treated as nonelective employer contributions. Thus, for example, the elective contributions are treated as nonelective employer contributions for purposes of sections 401(a) (including section 401(a)(4)) and 401(k), 404, 409, 411, 412, 415, 416, and 417 and are not subject to the requirements of section 401(m).

(iii) *Tax treatment of employees.* Elective contributions under a nonqualified cash or deferred arrangement are includible in an employee's gross income at the time the cash or other taxable amount that the employee would have received (but for the cash or deferred election) would have been includible in the employee's gross income. See § 1.402(a)–1(d)(1).

(iv) *Qualification of plan that includes a nonqualified cash or deferred arrangement.* A profit-sharing, stock bonus, pre-ERISA money purchase pension, or rural cooperative plan does not fail to satisfy the requirements of section 401(a) merely because the plan includes a nonqualified cash or deferred arrangement. In determining whether the plan satisfies the requirements of section 401(a)(4), the special nondiscrimination tests of sections 401(k)(3) and 401(m)(2) may not be used.

(6) *Rules applicable to partnership cash or deferred arrangements*—(i) *Application of general rules.* A partnership may maintain a cash or deferred arrangement, and individual partners may make cash or deferred elections with respect to compensation attributable to services rendered to the partnership. Generally, the same rules apply to partnership cash or deferred arrangements as apply to other cash or deferred arrangements. Thus, a partnership cash or deferred arrangement is not a qualified cash or deferred arrangement unless the requirements of section 401(k) and this section are satisfied. For example, any contributions made on behalf of an individual partner pursuant to a partnership cash or deferred arrangement are elective contributions unless they are designated or treated as after-tax employee contributions. Consistent with § 1.402(a)–1(d), the elective contributions are includible in income and are not deductible under section 404(a) unless the arrangement is a qualified cash or deferred arrangement. Also, even if the arrangement is a qualified cash or deferred arrangement, the elective contributions are includible in gross income and are not deductible under section 404(a) to the extent they exceed the applicable limit under section 402(g). See also § 1.401(a)–30.

(ii) *Definition of partnership cash or deferred arrangement*—(A) *General rule.* Effective for contributions made for plan years beginning after December 31, 1988, a cash or deferred arrangement includes any arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf.

(B) *Timing of partner's cash or deferred election.* For purposes of paragraph (a)(3)(ii) of this section, a partner's compensation is deemed currently available on the last day of the partnership taxable year. Accordingly, an individual partner may not make a cash or deferred election with respect to compensation for a partnership taxable year after the last day of that year. A partner's compensation for a partnership taxable year ending with or within a plan year beginning before October 15, 1991, is, however, deemed not to be currently available until the due date, including extensions, for filing the partnership's federal income tax return for its taxable year ending with or within the plan year. See § 1.401(k)–1(b)(4)(iii) for the rules regarding when contributions are treated as allocated.

(C) *Transition rule for partnership cash or deferred elections.* A one-time irrevocable election to participate or not to participate in a plan in which partners may participate is not a cash or deferred election if the election was made on or before the later of the first day of the first plan year beginning after December 31, 1988, or March 31, 1989. This election may be made after the commencement of employment or after the employee's first becoming eligible under any plan of the employer. The election may be made even if the one-time irrevocable election in § 1.401(k)–1(a)(3)(iv) was previously made.

(iii) *Treatment of certain matching contributions as elective contributions.* If a partnership makes matching contributions with respect to an individual partner's elective contributions or employee contributions, then the matching contributions are treated as elective contributions made on behalf of the partner. In the case of a plan that, on August 8, 1988, did not treat matching contributions as elective contributions, the preceding sentence applies only to plan years beginning

after August 8, 1988. See also §§ 1.401(m)–1(f)(12) and 1.404(e)–1A(f).

(7) *Rules applicable to collectively bargained plans*—(i) *In general.* The amount of employer contributions under a nonqualified cash or deferred arrangement is treated as satisfying section 401(a)(4) if the arrangement is part of a collectively bargained plan (including a plan adopted by a state or local government before May 6, 1986) that automatically satisfies the requirements of section 410(b). Except as specifically provided otherwise, elective contributions under the arrangement are treated as employer contributions. See § 1.401(k)–1(a)(5)(ii). However, elective contributions under the nonqualified cash or deferred arrangement are treated as employee contributions for purpose of section 402(a) for plan years beginning after December 31, 1992, and are therefore includible in gross income under section 402(a)(8). See § 1.402(a)–1(d)(3)(iv).

(ii) *Example.* The provisions of this paragraph (a)(7) are illustrated by the following example:

Example. For the 1994 plan year, Employer A maintains a collectively bargained plan that includes a cash or deferred arrangement. Employer contributions under the cash or deferred arrangement not satisfy the actual deferral percentage test of section 401(k)(3) and paragraph (b) of this section. Therefore, the arrangement is a nonqualified cash or deferred arrangement. The employer contributions under the cash or deferred arrangement are considered to be nondiscriminatory under section 401(a)(4), and the elective contributions are generally treated as employer contributions. Under § 1.402(a)–1(d)(1), however, elective contributions are includible in an employee's gross income.

(b) *Coverage and nondiscrimination requirements*—(1) *In general.* A cash or deferred arrangement satisfies this paragraph (b) for a plan year only if:

(i) The group of eligible employees under the cash or deferred arrangement satisfies the requirements of section 410(b) (including the average benefit percentage test, if applicable); and,

(ii) The cash or deferred arrangement satisfies the actual deferral percentage test described in paragraph (b)(2) of this section.

(2) *Actual deferral percentage test*—(i) *General rule.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (b) for a plan year only if:

(A) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by 1.25; or

(B) The excess of the actual deferral percentage for the group of eligible highly compensated employees over the actual deferral percentage for the group of all other eligible employees is not more than two percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage for the group of all other eligible employees multiplied by two.

An arrangement does not fail to satisfy the requirements of this paragraph (b)(2) merely because all of the eligible employees under an arrangement for a year are highly compensated employees.

(ii) *Rule for plan years beginning after 1979 and before 1987.* For plan years beginning after December 31, 1979, and before January 1, 1987, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (b) for a plan year only if:

(A) The actual deferral percentage for the group of eligible highly compensated employees (top one-third) is not more than the actual deferral percentage for the group of all other eligible employees (lower two-thirds) multiplied by 1.5; or

(B) The excess of the actual deferral percentage for the top one-third over the actual deferral percentage for the lower two-thirds is not more than three percentage points, and the actual deferral percentage for the top one-third is not more than the actual deferral percentage for the lower two-thirds multiplied by 2.5.

(iii) *Plan provision requirement.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, a plan that includes a cash or deferred arrangement does not satisfy the requirements of section 401(a) unless it provides that the actual deferral percentage test of section 401(k)(3) will be met. For purposes of this paragraph (b)(2)(iii), the plan may incorporate by reference the provisions of section 401(k)(3), this paragraph (b), and if applicable, section 401(m)(9) and § 1.401(m)–2.

(3) *Aggregation of arrangements and plans*—(i) *Aggregation of arrangements under plan.* Except as otherwise specifically provided in this paragraph (b)(3), all cash or deferred arrangements included in a plan are treated as a single cash or deferred arrangement. Thus, for example, if two groups of employees are eligible for separate cash or deferred arrangements under the same plan, the two cash or deferred arrangements are treated as a single cash or deferred arrangement, even if they have significantly different features, such as significantly different limits on elective contributions. See § 1.401(k)–1(g)(11) for the definition of plan used for purposes of this section.

(ii) *Aggregation of plans*—(A) *General rule.* Plans that are aggregated for purposes of section 410(b) (other than for purposes of the average benefit percentage test) are treated as a single plan for purposes of section 401(k) and this section. Thus, cash or deferred arrangements included in plans that are aggregated for purposes of section 410(b) (other than the average benefit percentage test) are treated as a single cash or deferred arrangement. For example, if an employer maintains cash or deferred arrangements under separate profit-sharing plans for its salaried and hourly employees, and treats the plans as a single plan for purposes of section 410(b), the cash or deferred arrangements included in the plans are treated as a single arrangement. See also paragraph (g)(1)(ii) of this section for rules requiring the aggregation of elective contributions under two or more plans in computing the actual deferral ratios of certain employees.

(B) *Prohibited aggregation.* Except as specifically provided in this paragraph (b) and § 1.401(k)–1(g)(11), section 410(b) provides the exclusive means for aggregating plans for purposes of this section. For example, allocations under a plan or portion of a plan described in section 4975(e) or 409 (an ESOP) may not be combined with contributions or allocations under any plan or portion of a plan not described in section 4975(e) or 409 (a non-ESOP) for purposes of determining whether either the ESOP or the non-ESOP satisfies the requirements of section 401(k). Similarly, in the case of a plan maintained by more than one employer to which section 413(c) applies, section 401(k) and this section must be applied as if each employer maintained a separate plan. Also, a cash or deferred arrangement covering both employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not so covered must be treated as two separate arrangements (one for each group of eligible employees) for purposes of section 401(k). Further, plans may not be aggregated unless they have the same plan year. In addition, plans that could be aggregated under section 410(b) but that are not actually aggregated for a year for purposes of section 410(b) (other than the average benefit percentage test) may not be aggregated for purposes of this section.

(iii) *Restructuring.* Effective for plan years beginning after December 31, 1991, restructuring may not be used to demonstrate compliance with the requirements of section 401(k). For plan years beginning before January 1, 1992, see § 1.401(k)–1(h)(3)(iii).

(iv) *Collectively bargained plans.* Participants in a collectively bargained plan to which section 413(b) applies are treated as employed by a single employer for purposes of section 401(k) (3) and (9), and paragraphs (b), (g)(1), and (g)(2) of this section. This special rule applies only if the participants are members of the collective bargaining unit, are employed by employers that are parties to the collective bargaining agreement, and are subject to the same contribution formula.

(4) *Elective contributions taken into account under the actual deferral percentage test*—(i) *General rule.* An elective contribution is taken into account under paragraph (b)(2) of this section for a plan year only if each of the following requirements is satisfied:

(A) The elective contribution is allocated to the employee's account under the plan as of a date within that plan year. For purposes of this rule, an elective contribution is considered allocated as of a date within a plan year only if—

(*1*) The allocation is not contingent upon the employee's participation in the plan or performance of services on any date subsequent to that date, and

(*2*) The elective contribution is actually paid to the trust no later than the end of the 12-month period immediately following the plan year to which the contribution relates.

(B) The elective contribution relates to compensation that either—

(*1*) Would have been received by the employee in the plan year but for the employee's election to defer under the arrangement, or

(*2*) Is attributable to services performed by the employee in the plan year and, but for the employee's election to defer, would have been received by the employee within two and one-half months after the close of the plan year.

(ii) *Elective contributions used to satisfy actual contribution percentage test.* Except as provided in § 1.401(m)–1(b)(5)(iii), elective contributions treated as matching contributions must satisfy the actual contribution percentage test of section 401(m)(2) and are not taken into account under paragraph (b)(2) of this section.

(iii) *Elective contributions for partners.* For purposes of paragraph (b)(2) of this section, a partner's distributive share of partnership income is treated as received on the last day of the partnership taxable year. Thus, an elective contribution made on behalf of a partner is treated as allocated to the partner's account for the plan year that includes the last day of the partnership taxable year, provided the requirements of paragraph (b)(4)(i)(A) of this section are met.

(iv) *Elective contributions not taken into account.* Elective contributions that do not satisfy the requirements of paragraph (b)(4)(i) of this section may not use the special nondiscrimination rule of section 401(k)(3) and paragraph (b)(2) of this section for the plan year with respect to which the contributions were made, or for any other plan year. Instead, the amount of the elective contributions must satisfy the requirements of section 401(a)(4) (without regard to the special nondiscrimination test in section 401(k)(3) and paragraph (b)(2) of this section) for the plan year in which they are allocated under the plan as if they were nonelective employer contributions and were the only nonelective employer contributions for the year.

(5) *Qualified nonelective contributions and qualified matching contributions that may be taken into account under the actual deferral percentage test.* Except as specifically provided otherwise, for purposes of paragraph (b)(2) of this section, all or part of the qualified nonelective contributions and qualified matching contributions made with respect to any or all employees who are eligible employees under the cash or deferred arrangement being tested may be treated as elective contributions under the arrangement, provided that each of the following requirements (to the extent applicable) is satisfied:

(i) The amount of nonelective contributions, including those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfies the requirements of section 401(a)(4).

(ii) The amount of nonelective contributions, excluding those qualified nonelective contributions treated as elective contributions for purposes of the actual deferral percentage test and those qualified nonelective contributions treated as matching contributions under § 1.401(m)–1(b)(5) for purposes of the actual contribution percentage test, satisfies the requirements of section 401(a)(4).

(iii) For plan years beginning before January 1, 1987, or such later date provided in paragraph (h) of this section, the matching contributions, including those qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(iv) For plan years beginning before January 1, 1987, or such later date provided in paragraph (h) of this section, the matching contributions, excluding those qualified matching contributions treated as elective contributions for purposes of the actual deferral percentage test, satisfy the requirements of section 401(a)(4).

(v) The qualified nonelective contributions and qualified matching contributions satisfy the requirements of paragraph (b)(4)(i) of this section for the plan year as if the contributions were elective contributions.

(vi) For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, the plan that includes the cash or deferred arrangement and the plan or plans to which the qualified nonelective contributions and qualified matching contributions are made, could be aggregated for purposes of section 410(b) (other than the average benefit percentage test). If the plan year of the plan that includes the cash or deferred arrangement is changed to satisfy the requirement under section 410(b) that aggregated plans have the same plan year, the qualified nonelective contributions and qualified matching contributions may be taken into account in the resulting short plan year only if the contributions satisfy the requirements of paragraph (b)(4)(i) of this section with respect to the short year as if the contributions were elective contributions and the aggregated plans could otherwise be aggregated for purposes of section 410(b).

(6) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples.

Example 1. (i) Employees A, B, and C are eligible employees who earn $30,000, $15,000, and $10,000, respectively, in 1989. In addition, their employer, X, contributes a bonus of up to 10 percent of their regular compensation to a trust under a profit-sharing plan that includes a cash or deferred arrangement. Under the arrangement, each eligible employee may elect to receive none, all, or any part of the 10 percent in cash. The employer contributes the remainder to the trust. The cash portion of the bonus, if any, is paid after the end of the plan year. The 10 percent is therefore not included in compensation until the year paid. Employee A is highly compensated. For the 1989 plan year, A, B, and C make the following elections:

Employee	Compensation	Elective contribution
A	$30,000	$1,780
B	15,000	750
C	10,000	450

(ii) The ratios of employer contributions to the trust on behalf of each eligible employee to the employee's compensation for the plan year (calculated separately for each employee) are:

Employee	Ratio of elective contribution to compensation	Actual deferral ratio (percent)
A	$1,780/30,000	5.93
B	750/15,000	5.00
C	450/10,000	4.50

(iii) The actual deferral percentage for the highly compensated group (Employee A) is 5.93 percent. The actual deferral percentage for the nonhighly compensated group is 4.75 percent ((5%+4.5%)/2)). Because 5.93 percent is less than 5.94 percent (4.75% multiplied by 1.25), the first percentage test is satisfied.

Example 2. (i) The facts are the same as in *Example 1*, except that elective contributions are made pursuant to a salary reduction agreement and no bonuses are paid. Compensation includes amounts that are contributed by salary reduction. In addition, A defers $2,025. Thus, the compensation and elective contributions for A, B, and C are:

Employee	Compensation	Elective contribution	Actual deferral ratio (percent)
A	$30,000	$2,025	6.75
B	15,000	750	5.00
C	10,000	450	4.50

(ii) The actual deferral percentage for the highly compensated group (Employee A) is 6.75 percent. The actual deferral percentage for the nonhighly compensated group is 4.75 percent ((5.00%+4.50%)/2). Because 6.75 percent exceeds 5.94 percent (4.75×1.25), the first percentage test is not satisfied. However, since the actual deferral percentage equals the maximum percentage allowed under the second percentage test, (4.75+2=6.75), the second percentage test is satisfied.

Example 3. (i) Employees D through K are eligible employees in Employer A's profit-sharing plan that contains a cash or deferred arrangement. Each eligible employee may elect to defer up to six percent of compensation under the cash or deferred arrangement. Employees D and E are highly compensated. The compensation, elective contributions, and actual deferral ratios of these employees for the 1989 plan year are shown below:

Employee	Compensation	Elective contributions	Actual deferral ratio (percent)
D	$100,000	$6,000	6
E	80,000	4,000	5
F	60,000	3,600	6
G	40,000	1,600	4
H	30,000	1,200	4
I	20,000	600	3
J	20,000	600	3
K	10,000	300	3
L	5,000	150	3

(ii) The actual deferral percentage for the highly compensated group is 5.5 percent. The actual deferral percentage for the nonhighly compensated group is 3.71 percent. Because 5.5 percent is greater than 4.64 percent (3.71%×1.25), the first percentage test is not satisfied. However, because 5.5 percent is less than 5.71 percent (the lesser of 3.71%+2 or 3.71%×2), the second percentage test is satisfied.

Example 4. (i) Employer D maintains a profit-sharing plan that contains a cash or deferred arrangement. The following amounts are contributed under the plan:

(A) Six percent of each employee's compensation. These contributions are not qualified nonelective contributions (QNCs).

(B) Two percent of each employee's compensation. These contributions are QNCs.

(C) Three percent of each employee's compensation that the employee may elect to receive as cash or to defer under the plan.

(ii) For the 1990 plan year, the compensation, elective contributions, and actual deferral ratios of employees M through S were:

Employee	Compensation	Elective contributions	Actual deferral ratio (percent)
M	$100,000	$3,000	3
N	80,000	1,600	2
O	60,000	1,800	3
P	40,000	0	0
Q	30,000	0	0
R	20,000	0	0
S	20,000	0	0

(iii) Both types of nonelective contributions are made for all employees. Thus, both the six percent and the two percent employer contributions satisfy the requirements of section 401(a)(4) and paragraph (b)(5)(i) of this section.

(iv) The elective contributions alone do not satisfy the special rules in paragraph (b)(4) of this section because the actual deferral percentage for the highly compensated group, consisting of employees M and N, is 2.5 percent and the actual deferral percentage for the nonhighly compensated group is 0.6 percent. However, the two percent QNCs may be taken into account in applying the special rules. The six percent nonelective contributions may not be taken into account because they are not QNCs.

(v) If the two percent QNCs are taken into account, the actual deferral percentage for the highly compensated group is 4.5 percent, and the actual deferral percentage for the nonhighly compensated group is 2.6 percent. Because 4.5 percent is not more than two percentage points greater than 2.6 percent, and not more than two times 2.6, the actual deferral percentage test of section 401(k)(3) and paragraph (b)(2) of this section is satisfied. Thus, the plan satisfies this paragraph (b).

Example 5. (i) Employer N maintains a plan that contains a cash or deferred arrangement. The plan year and the employer's taxable year are the calendar year. The plan provides for employee contributions, elective contributions, matching contributions, and qualified nonelective contributions (QNCs), all of which meet the applicable requirements of section 401(a)(4). Matching contributions on behalf of nonhighly compensated employees are qualified matching contributions (QMACs). Matching contributions on behalf of highly compensated employees are not QMACs. For the 1988 plan year, elective contributions and matching contributions with respect to highly compensated and nonhighly compensated employees are shown in the following chart.

	Elective contributions (including QNCs) (percent)	Total matching contributions (percent)	QMACs (percent)
Highly compensated	15	5	0
Nonhighly compensated	11	5	5

(ii) The plan fails to meet the requirements of section 401(k)(3)(A) because 15 percent is more than 125 percent of, and more than two percentage points greater than, 11 percent. However, the plan provides that QMACs may be used to meet the requirements of section 401(k)(3)(A)(ii) to the extent needed under that section. Under this provision, the plan takes QMACs of one percent of compensation into account for each nonhighly compensated employee in applying the actual deferral percentage test. After this adjustment, the actual deferral and actual contribution percentages are as follows:

	Actual deferral percentage	Actual contribution percentage
Highly compensated	15	5
Nonhighly compensated	12	4

(iii) The elective contributions and QMACs taken into account under section 401(k) meet the requirements of section 401(k)(3)(A)(ii) because 15 percent is 125 percent of 12 percent. The remaining matching contributions meet the requirements of section 401(m) because five percent is 125 percent of four percent.

(c) *Nonforfeitability requirement*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (c)

only if the elective contributions meet each of the following requirements:

(i) Each employee's right to the amount attributable to elective contributions is immediately nonforfeitable within the meaning of section 411, and would be nonforfeitable under the plan regardless of the age and service of the employee or whether the employee is employed on a specific date. A contribution that is subject to forfeitures or suspensions permitted by section 411(a)(3) does not satisfy the requirements of this paragraph (c).

(ii) The contributions are disregarded for purposes of applying section 411(a) to other contributions or benefits.

(iii) The contributions remain nonforfeitable even if the employee makes no additional elective contributions under a cash or deferred arrangement.

(2) *Example.* The provisions of this paragraph (c) are illustrated by the following example:

Example. (i) Employees B and C are covered by Employer Y's stock bonus plan, which includes a cash or deferred arrangement. Under the plan, Employer Y makes a nonelective contribution on behalf of each employee equal to four percent of compensation. All employees participating in the plan have a nonforfeitable right to a percentage of their accrued benefit derived from this contribution as shown in the following table:

Years of service	Nonforfeitable percentage
Less than 1	0
1	20
2	40
3	60
4	80
5 or more	100

(ii) B and C have three and six years of service, respectively. Employer Y also permits employees to elect to defer up to 6 percent of compensation through salary reduction agreements. Amounts deferred under these agreements are nonforfeitable at all times. In accordance with paragraph (c)(1)(i) of this section, the nonforfeitable percentage of Employer Y's nonelective contribution on behalf of B and C may not be treated as a qualified nonelective contribution under paragraph (b)(3) of this section, because these amounts are nonforfeitable by reason of the completion by B and C of a stated number of years of service, and not regardless of the age and service of B and C.

(d) *Distribution limitation*—(1) *General rule.* A cash or deferred arrangement satisfies this paragraph (d) only if amounts attributable to elective contributions may not be distributed before one of the following events, and any distributions so permitted also satisfy the requirements of paragraphs (d) (2) through (6) of this section (to the extent applicable):

(i) The employee's retirement, death, disability, or separation from service.

(ii) In the case of a profit-sharing or stock bonus plan, the employee's attainment of age 59½, or the employee's hardship.

(iii) For plan years beginning after December 31, 1984, the termination of the plan.

(iv) For plan years beginning after December 31, 1984, the date of the sale or other disposition by a corporation of substantially all the assets (within the meaning of section 409(d)(2)) used by the corporation in a trade or business of the corporation to an unrelated corporation.

(v) For plan years beginning after December 31, 1984, the date of the sale or other disposition by a corporation of its interest in a subsidiary (within the meaning of section 409(d)(3)) to an unrelated entity or individual.

(2) *Rules applicable to hardship distributions*—(i) *Distribution must be on account of hardship.* A distribution is treated as made after an employee's hardship for purposes of paragraph (d)(1)(ii) of this section only if it is made on account of the hardship. For purposes of this rule, a distribution is made on account of hardship only if the distribution both is made on account of an immediate and heavy financial need of the employee and is necessary to satisfy the financial need. The determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan. See section 411(d)(6) and the regulations thereunder.

(ii) *Limit on distributable amount.* For plan years beginning after December 31, 1988, a distribution on account of hardship must be limited to the distributable amount. The distributable amount is equal to the employee's total elective contributions as of the date of distribution, reduced by the amount of previous distributions on account of hardship. If the plan so provides, the employee's total elective contributions used in determining the distributable amount may be increased by income allocable to elective contributions, by amounts treated as elective contributions under paragraph (b)(5) of this section, and by income allocable to amounts treated as elective contributions. In each case, the distributable amount may only include amounts that were credited to the employee's account as of a date specified in the plan that is no later than the end of the last plan year ending before July 1, 1989 (or such later date provided in paragraph (h) of this section). g

(iii) *General hardship distribution standards*—(A) *Immediate and heavy financial need.* Whether an employee has an immediate and heavy financial need is to be determined based on all relevant facts and circumstances. Generally, for example, the need to pay the funeral expenses of a family member would constitute an immediate and heavy financial need. A distribution made to an employee for the purchase of a boat or television would generally not constitute a distribution made on account of an immediate and heavy financial need. A financial need may be immediate and heavy even if it was reasonably foreseeable or voluntarily incurred by the employee.

(B) *Distribution necessary to satisfy financial need.* A distribution is not treated as necessary to satisfy an immediate and heavy financial need of an employee to the extent the amount of the distribution is in excess of the amount required to relieve the financial need or to the extent the need may be satisfied from other resources that are reasonably available to the employee. This determination generally is to be made on the basis of all relevant facts and circumstances. For purposes of this paragraph, the employee's resources are deemed to include those assets of the employee's spouse and minor children that are reasonably available to the employee. Thus, for example, a vacation home owned by the employee and the employee's spouse, whether as community property, joint tenants, tenants by the entirety, or tenants in common, generally will be deemed a resource of the employee. However, property held for the employee's child under an irrevocable trust or under the Uniform Gifts to Minors Act is not treated as a resource of the employee. The amount of an immediate and heavy financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution. A distribution generally may be treated as necessary to satisfy a financial need if the employer relies upon the employee's written representation, unless the employer has actual knowledge to the contrary, that the need cannot reasonably be relieved:

(*1*) Through reimbursement or compensation by insurance or otherwise;

(*2*) By liquidation of the employee's assets;

(*3*) By cessation of elective contributions or employee contributions under the plan; or

(*4*) By other distributions or nontaxable (at the time of the loan) loans from plans maintained by the employer or by any other employer, or by borrowing from commercial sources on reasonable commercial terms in an amount sufficient to satisfy the need.

For purposes of this paragraph (d)(2)(iii)(B), a need cannot reasonably be relieved by one of the actions listed above if the effect would be to increase the amount of the need. For example, the need for funds to purchase a principal residence cannot reasonably be relieved by a plan loan if the loan would disqualify the employee from obtaining other necessary financing.

(iv) *Deemed hardship distribution standards*—(A) *Deemed immediate and heavy financial need.* A distribution is deemed to be on account of an immediate and heavy financial need of the employee if the distribution is for:

(*1*) Expenses for medical care described in section 213(d) previously incurred by the employee, the employee's spouse, or any dependents of the employee (as defined in section 152) or necessary for these persons to obtain medical care described in section 213(d);

(*2*) Costs directly related to the purchase of a principal residence for the employee (excluding mortgage payments);

(*3*) Payment of tuition and related educational fees for the next 12 months of post-secondary education for the employee, or the employee's spouse, children, or dependents (as defined in section 152); or

(*4*) Payments necessary to prevent the eviction of the employee from the employee's principal residence or foreclosure on the mortgage on that residence.

(B) *Distribution deemed necessary to satisfy financial need.* A distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if all of the following requirements are satisfied:

(*1*) The distribution is not in excess of the amount of the immediate and heavy financial need of the employee. The amount of an immediate and heavy financial need may include any amounts necessary to pay any federal, state, or local income taxes or penalties reasonably anticipated to result from the distribution.

(*2*) The employee has obtained all distributions, other than hardship distributions, and all nontaxable (at the time of the loan) loans currently available under all plans maintained by the employer.

(*3*) The plan and all other plans maintained by the employer limit the employee's elective contributions for the next taxable year to the applicable limit under section 402(g) for that year minus the employee's elective contributions for the year of the hardship distribution.

(*4*) The employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 12 months after receipt of the hardship distribution. For this purpose the phrase "all other plans maintained by the employer" means all qualified and nonqualified plans of deferred compensation maintained by the employer. The phrase includes a stock option, stock purchase, or similar plan, or a cash or deferred arrangement that is part of a cafeteria plan within the meaning of section 125. However, it does not include the mandatory employee contribution portion of a defined benefit plan. It also does not include a health or welfare benefit plan, including one that is part of a cafeteria plan within the meaning of section 125. See § 1.401(k)–1(g)(4)(i) for the continued treatment of suspended employees as eligible employees.

(C) *Commissioner may expand standards.* The Commissioner may expand the list of deemed immediate and heavy financial needs and may prescribe additional methods for distributions to be deemed necessary to satisfy an immediate and heavy financial need only in revenue rulings, notices, and other documents of general applicability, and not on an individual basis.

(3) *Rules applicable to distributions upon plan termination.* A distribution may not be made under paragraph (d)(1)(iii) of this section if the employer establishes or maintains a successor plan. For purposes of this rule, a successor plan is any other defined contribution plan maintained by the same employer. However, if fewer than two percent of the employees who are eligible under the plan that includes the cash or deferred arrangement at the time of its termination are or were eligible under another defined contribution plan at any time during the 24 month period beginning 12 months before the time of the termination, the other plan is not a successor plan. The term "defined contribution plan" means a plan that is a defined contribution plan as defined in section 414(i), but does not include an employee stock ownership plan as defined in section 4975(e) or 409 or a simplified employee pension as defined in section 408(k). A plan is a successor plan only if it exists at the time the plan including the cash or deferred arrangement is terminated or within the period ending 12 months after distribution of all assets from the plan.

(4) *Rules applicable to distributions upon sale of assets or subsidiary*—(i) *Seller must maintain the plan.* A distribution may be made under section 401(k)(10) and paragraph (d)(1) (iv) or (v) of this section only from a plan that the seller continues to maintain after the disposition. This requirement is satisfied only if the purchaser does not maintain the plan after the disposition. A purchaser maintains the plan of the seller if it adopts the plan or otherwise becomes an employer whose employees accrue benefits under the plan. A purchaser also maintains the plan if the plan is merged or consolidated with, or any assets or liabilities are transferred from the plan to, a plan maintained by the purchaser in a transaction subject to section 414(l)(1). A purchaser is not treated as maintaining the plan merely because a plan that it maintains accepts rollover contributions of amounts distributed by the plan.

(ii) *Employee must continue employment.* A distribution may be made under paragraph (d)(1) (iv) or (v) of this section only to an employee who continues employment with the purchaser of assets or with the subsidiary, whichever is applicable.

(iii) *Distribution must be in connection with disposition of assets or subsidiary.* Elective contributions may not be distributed under paragraph (d)(1) (iv) or (v) of this section except in connection with the disposition that results in the employee's transfer to the purchaser. Whether a distribution is made in connection with the disposition of assets or a subsidiary depends on all of the facts and circumstances. Except in unusual circumstances, however, a distribution will not be treated as having been made in connection with a disposition unless it was made by the end of the second calendar year after the calendar year in which the disposition occurred.

(iv) *Definitions*—(A) *Substantially all.* For purposes of paragraph (d)(1)(iv) of this section, the sale of "substantially all" the assets used in a trade or business means the sale of at least 85 percent of the assets.

(B) *Unrelated employer.* For purposes of paragraph (d)(1) (iv) and (v) of this section, an "unrelated" entity or individual is one that is not required to be aggregated with the seller under

section 414 (b), (c), (m), or (o) after the sale or other disposition.

(5) *Lump sum requirement for certain distributions.* After March 31, 1988, a distribution may be made under paragraph (d)(1) (iii), (iv), or (v) of this section only if it is a lump sum distribution. The term "lump sum distribution" has the meaning provided in section 402(e)(4), without regard to subparagraphs (A) (i) through (iv), (B), and (H) of that section.

(6) *Rules applicable to all distributions*—(i) *Impermissible distributions.* Amounts attributable to elective contributions may not be distributed on account of any event not described in this paragraph (d), such as completion of a stated period of plan participation or the lapse of a fixed number of years. For example, if excess deferrals (and income) for an employee's taxable year are not distributed within the time prescribed in § 1.402(g)–1(e) (2) or (3), the amounts may be distributed only on account of an event described in this paragraph (d).

(ii) *Deemed distributions.* The cost of life insurance (P.S. 58 costs) is not treated as a distribution for purposes of section 401(k)(2) and this paragraph. The making of a loan is not treated as a distribution, even if the loan is secured by the employee's accrued benefit attributable to elective contributions or is includible in the employee's income under section 72(p). However, the reduction, by reason of default on a loan, of an employee's accrued benefit derived from elective contributions is treated as a distribution.

(iii) *ESOP dividend distributions.* A plan does not fail to satisfy the requirements of this paragraph (d) merely by reason of a dividend distribution described in section 404(k)(2).

(iv) *Limitations apply after transfer.* The limitations of this paraqraph (d) generally continue to apply to amounts attributable to elective contributions (including amounts treated as elective contributions) that are transferred to another qualified plan of the same or another employer. Thus, the transferee plan will generally fail to satisfy the requirements of section 401(a) and this section if transferred amounts may be distributed before the times specified in this paragraph (d). The limitations of paragraph (d) of this section cease to apply after the transfer, however, if the amounts could have been distributed at the time of the transfer (other than on account of hardship), and the transfer is an elective transfer described in § 1.411(d)–4, Q&A–3(b)(1).

(v) *Required consent.* A distribution may be made under this paragraph (d) only if any consent or election required under section 411(a)(11) or 417 is obtained.

(7) *Examples.* The provisions of this paragraph (d) are illustrated by the following examples:

Example 1. Employer C maintains a profit-sharing plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be withdrawn for any reason after two years following the end of the plan year in which the contributions were made. Because the plan permits distributions of elective contributions before the occurrence of one of the events specified in section 401(k)(2)(B) and this paragraph (d), the plan includes a nonqualified cash or deferred arrangement and the elective contributions are currently includible in income under section 402.

Example 2. Employer D maintains a pre-ERISA money purchase plan that includes a cash or deferred arrangement. Elective contributions under the arrangement may be distributed to an employee on account of hardship. Under paragraph (d)(1) of this section, hardship is a distribution event only in a profit-sharing or stock bonus plan. Since elective contributions under the arrangement may be distributed before a distribution event occurs, the cash or deferred arrangement does not satisfy this paragraph (d), and is not a qualified cash or deferred arrangement. Moreover, the plan is not a qualified plan because a pension plan may not provide for payment of benefits upon hardship. See § 1.401–1(b)(1)(i).

(e) *Additional requirements for qualified cash or deferred arrangements*—(1) *Qualified profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if the plan of which it is a part is a profit-sharing, stock bonus, pre-ERISA money purchase or rural cooperative plan that otherwise satisfies the requirements of section 401(a) (taking into account the cash or deferred arrangement). A plan that includes a cash or deferred arrangement may provide for other contributions, including employer contributions (other than elective contributions), employee contributions, or both. See paragraph (e) of this section, however, for limitations on the extent to which elective contributions under a cash or deferred arrangement may be taken into account in determining whether the other contributions satisfy the requirements of section 401(a).

(2) *Cash availability requirement.* A cash or deferred arrangement satisfies this paragraph (e) only if the arrangement provides that the amount that each eligible employee may defer as an elective contribution is available to the employee in cash. Thus, for example, if an eligible employee is provided the option to receive a taxable benefit (other than cash) or to have the employer contribute on the employee's behalf to a profit-sharing plan an amount equal to the value of the taxable benefit, the arrangement is not a qualified cash or deferred arrangement. Similarly, if an employee has the option to receive a specified amount in cash or to have the employer contribute an amount in excess of the specified cash amount to a profit-sharing plan on the employee's behalf, any contribution made by the employer on the employee's behalf in excess of the specified cash amount is not treated as made pursuant to a qualified cash or deferred arrangement. This cash availability requirement applies even if the cash or deferred arrangement is part of a cafeteria plan within the meaning of section 125.

(3) *Separate accounting requirement*—(i) *General rule.* A cash or deferred arrangement satisfies this paragraph (e) only if the portion of an employee's benefit subject to the requirements of paragraphs (c) and (d) of this section is determined by an acceptable separate accounting between that portion and any other benefits. Separate accounting is not acceptable unless gains, losses, withdrawals, and other credits or charges are separately allocated on a reasonable and consistent basis to the accounts subject to the requirements of paragraphs (c) and (d) of this section and to other accounts. Subject to section 401(a)(4), forfeitures are not required to be allocated to the accounts in which benefits are subject to paragraphs (c) and (d) of this section.

(ii) *Failure to satisfy separate accounting requirement.* The requirements of paragraph (e)(3)(i) of this section are treated as satisfied if all amounts held under a plan that includes a cash or deferred arrangement or under another plan, contributions under which are taken into account under the arrangement for purposes of paragraph (b) of this section are treated as attributable to elective contributions subject to the requirements of paragraphs (c) and (d) of this section.

(4) *Limitations on cash or deferred arrangements of state and local governments and tax-exempt organizations*—(i) A cash or deferred arrangement does not satisfy the requirements of this paragraph (e) if the arrangement is adopted:

(A) After May 6, 1986, by a state or local government or political subdivision thereof, or any agency or instrumentality thereof ("a governmental unit"), or

(B) After July 1, 1986, by any organization exempt from tax under subtitle A of the Internal Revenue Code.

For purposes of paragraph (e)(4) of this section, whether an organization is exempt from tax under subtitle A of the Internal Revenue Code is determined without regard to section 414 (b), (c), (m) or (o).

(ii) A cash or deferred arrangement is treated as adopted after the dates described in paragraph (e)(4)(i) of this section with respect to all employees of any employer that adopts the arrangement after such dates. If an employer adopted an arrangement prior to such dates, all employees of the employer may participate in the arrangement.

(iii) For purposes of this paragraph (e)(4), an employer that has made a legally binding commitment to adopt a cash or deferred arrangement is treated as having adopted the arrangement on that date.

(iv) If a governmental unit adopted a cash or deferred arrangement before May 7, 1986, then any cash or deferred arrangement adopted by the unit at any time is treated as adopted before that date.

(v) This paragraph (e)(4) does not apply to a rural cooperative plan.

(vi) For purposes of this paragraph (e)(4), an employee representative is treated as an employee of a tax exempt employer even if the employee could be treated as an employee by another employer under § 1.413–1(i)(1).

(5) *One-year eligibility requirement.* For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if no employee is required to complete a period of service greater than one year (determined without regard to section 410(a)(1)(B)(i)) with the employer maintaining the plan to be eligible to make an election under the arrangement.

(6) *Other benefits not contingent upon elective contributions*—(i) *General rule.* For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if no other benefit is conditioned (directly or indirectly) upon the employee's electing to make or not to make elective contributions under the arrangement. The preceding sentence does not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election or to any benefit that is provided at the employee's election under a plan described in section 125(d) in lieu of an elective contribution under a qualified cash or deferred arrangement.

(ii) *Definition of other benefits.* Other benefits include, but are not limited to, benefits under a defined benefit plan; nonelective employer contributions under a defined contribution plan; the availability, cost, or amount of health benefits; vacations or vacation pay; life insurance; dental plans; legal services plans; loans (including plan loans); financial planning services; subsidized retirement benefits; stock options; property subject to section 83; and dependent care assistance. Also, increases in salary and bonuses (other than those actually subject to the cash or deferred election) are benefits for purposes of this paragraph (e)(6). The ability to make after-tax employee contributions is a benefit, but that benefit is not contingent upon an employee's electing to make or not make elective contributions under the arrangement merely because the amount of elective contributions reduces dollar-for-dollar the amount of after-tax employee contributions that may be made.

(iii) *Effect of certain statutory limits.* A benefit under a defined benefit plan that is contingent upon elective contributions solely by reason of the combined plan fraction of section 415(e) is not treated as contingent for purposes of this paragraph (e)(6). Similarly, any benefit under an excess benefit plan described in section 3(36) of the Employee Retirement Income Security Act of 1974 that is dependent on the employee's electing to make or not to make elective contributions is not treated as contingent.

(iv) *Nonqualified deferred compensation.* Participation in a nonqualified deferred compensation plan is treated as contingent for purposes of this paragraph (e)(6) only to the extent that an employee may receive additional deferred compensation under the nonqualified plan to the extent the employee makes or does not make elective contributions. Deferred compensation under a nonqualified plan of deferred compensation that is dependent on an employee's having made the maximum elective deferrals under section 402(g) or the maximum elective contributions permitted under the terms of the plan also is not treated as contingent.

(v) *Plan loans and distributions.* A loan or distribution of elective contributions is not a benefit conditioned on an employee's electing to make or not make elective contributions under the arrangement merely because the amount of the loan or distribution is based on the amount of the employee's account balance.

(7) *Coordination with other plans.* For plan years beginning after December 31, 1988, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if no elective contributions (or qualified nonelective or qualified matching contributions treated as elective contributions under paragraph (b)(5) of this section) under the arrangement are taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the elective contributions are made) satisfy the requirements of section 401(a). For example, elective contributions under a cash or deferred arrangement generally may not be taken into account in determining whether a plan satisfies the minimum contribution or benefit requirements of section 416. See § 1.416–1, M–20. However, qualified nonelective contributions that are treated as elective contributions for purposes of section 401(k)(3) under paragraph (b)(5) of this section may be used to enable a plan to satisfy the minimum contribution or benefit requirements under section 416. See § 1.416–1, M–18. This paragraph (e) does not apply for purposes of determining whether a plan satisfies the average benefit percentage requirement of section 410(b)(2)(A)(ii). See also § 1.401(m)–1(b)(5) for circumstances under which elective contributions may be used to determine whether a plan satisfies the requirements of section 401(m).

(8) *Recordkeeping requirements.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, a cash or deferred arrangement satisfies this paragraph (e) only if the employer maintains the records necessary to demonstrate compliance with the applicable nondiscrimination requirements of paragraph (b) of this section, including the extent to which qualified nonelective contributions and qualified matching contributions are taken into account.

(f) *Correction of excess contributions*—(1) *General rule*—(i) *Permissible correction methods.* A cash or deferred arrangement does not fail to satisfy the requirements of section 401(k)(3) or paragraph (b)(2) of this section with respect to the amount of elective contributions under the arrangement if the employer, in accordance with the terms of the plan that includes the cash or deferred arrangement and paragraph (b)(5) of this section, makes qualified nonelective

contributions or qualified matching contributions that are treated as elective contributions under the arrangement and that, in combination with the elective contributions, satisfy the requirements of paragraph (b)(2) of this section. In addition, a cash or deferred arrangement does not fail to satisfy the requirements of section 401(k)(3) or paragraph (b)(2) of this section for a plan year with respect to the amount of the elective contributions under the arrangement if, in accordance with the terms of the plan that includes the cash or deferred arrangement, excess contributions are recharacterized in accordance with paragraph (f)(3) of this section, or excess contributions (and income allocable thereto) are distributed in accordance with paragraph (f)(4) of this section.

(ii) *Combination of correction methods.* A plan may use any of the correction methods described in paragraph (f)(1)(i) of this section, may limit elective contributions in a manner designed to prevent excess contributions from being made, or may use a combination of these methods, to avoid or correct excess contributions. Thus, for example, a portion of the excess contributions for a highly compensated employee may be recharacterized under paragraph (f)(3) of this section, and the remaining portion of the excess contributions may be distributed under paragraph (f)(4) of this section. A plan may require or permit a highly compensated employee to elect whether any excess contributions are to be recharacterized or distributed.

(iii) *Impermissible correction methods.* Excess contributions for a plan year may not remain unallocated, or be allocated to a suspense account for allocation to one or more employees in any future year. See paragraph (f)(6) of this section with respect to the effects of a failure to correct excess contributions.

(iv) *Partial distributions.* Any distribution of less than the entire amount of excess contributions with respect to any highly compensated employee is treated as a pro rata distribution of excess contributions and allocable income or loss.

(2) *Amount of excess contributions.* The amount of excess contributions for a highly compensated employee for a plan year is the amount (if any) by which the employee's elective contributions must be reduced for the employee's actual deferral ratio to equal the highest permitted actual deferral ratio under the plan. To calculate the highest permitted actual deferral ratio under a plan, the actual deferral ratio of the highly compensated employee with the highest actual deferral ratio is reduced by the amount required to cause the employee's actual deferral ratio to equal the ratio of the highly compensated employee with the next highest actual deferral ratio. If a lesser reduction would enable the arrangement to satisfy the actual deferral percentage test, only this lesser reduction may be made. This process must be repeated until the cash or deferred arrangement satisfies the actual deferral percentage test. The highest actual deferral ratio remaining under the plan after leveling is the highest permitted actual deferral ratio. In no case may the amount of excess contributions to be recharacterized or distributed for a plan year with respect to any highly compensated employee exceed the amount of elective contributions made on behalf of the highly compensated employee for the plan year.

(3) *Recharacterization of excess contributions*—(i) *General rule.* Excess contributions are recharacterized in accordance with this paragraph (f)(3) only if the excess contributions are treated as described in paragraph (f)(3)(ii) of this section, and all of the conditions set forth in paragraph (f)(3)(iii) of this section are satisfied.

(ii) *Treatment of recharacterized excess contributions.* Excess contributions recharacterized under this paragraph (f)(3) are includible in the employee's gross income on the earliest dates any elective contribution made on behalf of the employee during the plan year would have been received by the employee had the employee originally elected to receive the amounts in cash, or on such later date permitted in paragraph (f)(3)(iv) of this section. The recharacterized excess contributions must be treated as employee contributions for purposes of section 72, section 401(a)(4) and 401(m), and paragraphs (b) and (d) of this section. This requirement is not treated as satisfied unless:

(A) The payor or plan administrator reports the recharacterized excess contributions as employee contributions to the Internal Revenue Service and the employee by—

(*1*) Timely providing such forms as the Commissioner may designate to the employer and to employees whose excess contributions are recharacterized under this paragraph (f)(3); and

(*2*) Timely taking such other action as the Commissioner may require; and

(B) The plan administrator accounts for the amounts as contributions by the employee for purposes of sections 72 and 6047.

Recharacterized excess contributions continue to be treated as employer contributions that are elective contributions for all other purposes under the Code, including sections 401(a) (other than 401(a)(4) and 401(m)), 404, 409, 411, 412, 415, 416, and 417, and, with respect to recharacterized excess contributions for plan years beginning after December 31, 1988, section 401(k)(2). Thus, for example, recharacterized excess contributions remain subject to the requirements of paragraph (c) of this section; must be deducted under section 404; and are treated as employer contributions described in section 415(c)(2)(A) and § 1.415–6(b). In addition, these amounts are not treated as compensation for purposes of sections 404 and 415, and may be treated as compensation for purposes of sections 401(a)(4), 401(a)(5), 401(k), 401(l) and 414(s) only to the extent that elective contributions may be treated, and are treated under the plan, as compensation. Recharacterized excess contributions that relate to plan years ending on or before October 24, 1988, may be treated as either employer contributions or employee contributions for purposes of paragraph (d) of this section. The amount of excess contributions included in an employee's gross income is reduced as provided under paragraph (f)(5)(i)(B) of this section.

(iii) *Additional rules*—(A) *Time of recharacterization.* Excess contributions may not be recharacterized under this paragraph (f)(3) after the later of October 24, 1988, or 2½ months after the close of the plan year to which the recharacterization relates. Recharacterization is deemed to have occurred on the date on which the last of those highly compensated employees with excess contributions to be recharacterized is notified in accordance with paragraph (f)(3)(ii)(A) of this section. The Commissioner may designate the means by which this notification is to be provided.

(B) *Employee contributions must be permitted under plan.* The amount of recharacterized excess contributions, in combination with the employee contributions actually made by the highly compensated employee, may not exceed the maximum amount of employee contributions (determined without regard to the actual contribution percentage test of section 401(m)(2)) that the highly compensated employee could have made under the provisions of the plan in effect on the first day of the plan year in the absence of recharacterization. See § 1.401(m)–1(a)(2) for requirements relating to the availability of employee contributions.

(C) *Plans under which excess contributions may be recharacterized.* For plan years beginning after December 31, 1991, elective contributions may be recharacterized under this paragraph (f)(3) only under the plan under which they are made or under a plan with which that plan could be aggregated for purposes of section 410(b) (other than the average benefit percentage test). For plan years beginning before that date and after December 31, 1988, or such later date provided under paragraph (h) of this section, elective contributions may be recharacterized under this paragraph (f)(3) only under the plan under which they are made or under a plan with the same plan year as that plan.

(iv) *Transition rules.* If amounts recharacterized for any plan year were not previously included in income, they must be treated as received by employees for income tax purposes on the first day of the first plan year ending after 1987. If notice of recharacterization was provided to the affected highly compensated employees by October 24, 1988, recharacterization is deemed to have occurred 2½ months after the close of the plan year and the penalty tax of section 4979 will not be imposed. The rules in this paragraph (f)(3)(iv) are effective only for plan years ending before August 9, 1988.

(v) *Example.* The provisions of this paragraph (f)(3) are illustrated by the following example:

Example. (i) Employer X maintains Plan Y, a calendar year profit-sharing plan that includes a qualified cash or deferred arrangement. Under Plan Y, each eligible employee may elect to defer up to 10 percent of compensation under a salary reduction agreement. An eligible employee may also make employee contributions of up to 10 percent of compensation. X pays the amounts deferred under to the trust on the last day of each month. Salaries are paid on the same date.

(ii) (A) In January 1989, X determines that during 1988 the compensation and actual deferral ratios (ADRs) of X's six employees were as follows:

Employee	Compensation (A)	Elective contribution (B)	ADR (%)(B/A)
A	$70,000	$7,000	10.00
B	60,000	4,500	7.50
C	20,000	1,000	5.00
D	15,000	0	0
E	10,000	350	3.50
F	10,000	350	3.50

(B) The average deferral percentage (ADP) for X's highly compensated group, A and B, is 8.75 percent ((10.00%+7.50%)/2). The ADP for X's other employees is 3 percent ((5.00%+0% + 3.50% + 3.50%)/4). Because 8.75 percent is more than 2 times 3 percent and more than 3 percent plus 2 percentage points, the plan fails to satisfy paragraph (b)(2) of this section. Neither A nor B made any employee contributions for the year.

(iii) Plan Y provides that each highly compensated participant will have excess contributions, as defined in paragraph (g)(7) of this section, recharacterized. The amount to be recharacterized will be determined according to the method described in paragraph (f)(2) of this section.

(iv) In order to satisfy paragraph (b)(2) of this section, Plan Y must reduce the ADP for X's highly compensated employees to not more than 5 percent. This will satisfy the test described in paragraph (b)(2) of this section, because 5 percent is not more than 2 times 3 percent and is not more than 2 percentage points greater than 3 percent. Plan Y first reduces A's ADR to 7.5 percent (the ADR of the highly compensated employee having the next highest ADR). Since this is not sufficient to satisfy the ADP test in paragraph (b)(2) of this section, the ADR of both A and B must be reduced to 5 percent.

(v) The maximum dollar amount that may be deferred by each employee is determined by using the formula D=(ADR×S) where D is the maximum allowable deferral, ADR is the reduced ADR, and S is the compensation. Thus, A's maximum allowable deferral is $3,500 (.05×$70,000), and B's maximum allowable deferral is $3,000 (.05×$60,000). The balance of the original deferrals by A and B ($3,500 and $1,500 respectively) must be included in their taxable wages for 1988, the year in which X would have paid cash to A and B.

(vi) A deferred $583.33 per month, except for January, February, March, and April, when A deferred $583.34. Pursuant to the first-in, first-out rule in paragraph (f)(3)(ii) of this section, the deferrals made in January, February, March, and May, as well as $583.31 of the deferral made in June, are treated as employee contributions. A similar procedure is undertaken with respect to B. X and the plan administrator provide A and B with the forms and notices that the Commissioner requires. If A and B had already filed income tax returns for 1988, they must file amended returns. If Plan Y had a plan year ending November 30, 1987, and A and B had made elective deferrals in December 1987, they would also have to file amended returns for 1987. In addition, the plan administrator must satisfy paragraph (f)(3)(ii)(B) of this section. Of course, the actual contribution percentage test of section 401(m)(2) must be satisfied for 1988, taking the recharacterized amounts into account.

(4) *Corrective distribution of excess contributions (and income)*—(i) *General rule.* Excess contributions (and income allocable thereto) are distributed in accordance with this paragraph (f)(4) only if the excess contributions and allocable income are designated by the employer as a distribution of excess contributions (and income), and are distributed to the appropriate highly compensated employees after the close of the plan year in which the excess contributions arose and within 12 months after the close of that plan year. In the event of a complete termination of the plan during the plan year in which an excess contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of a highly compensated employee is distributed during the plan year in which an excess contribution arose, the distribution is deemed to have been a corrective distribution of excess contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(ii) *Income allocable to excess contributions*—(A) *General rule.* The income allocable to excess contributions is equal to the sum of the allocable gain or loss for the plan year and, if the plan so provides, the allocable gain or loss for the period between the end of the plan year and the date of distribution (the "gap period").

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participants' accounts.

(C) *Alternative method of allocating income.* A plan may allocate income to excess contributions by multiplying the income for the plan year (and the gap period, if the plan so provides) allocable to elective contributions and amounts treated as elective contributions by a fraction. The numerator of the fraction is the excess contributions for the employee for the plan year. The denominator of the fraction is equal to the sum of:

(*1*) The total account balance of the employee attributable to elective contributions and amounts treated as elective contributions as of the beginning of the plan year; plus

(*2*) The employee's elective contributions and amounts treated as elective contributions for the plan year and for the gap period if gap period income is allocated.

(D) *Safe harbor method of allocating gap period income.* Under the safe harbor method, income on excess contributions for the gap period is equal to 10 percent of the income allocable to excess contributions for the plan year (calculated under the method described

in paragraph (f)(4)(ii)(C)) of this section, multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of the month is treated as made on the last day of the preceding month. A distribution made after the fifteenth day of the month is treated as made on the first day of the next month.

(iii) *No employee or spousal consent required.* A corrective distribution of excess contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(iv) *Treatment of corrective distributions as employer contributions.* Excess contributions are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan.

(v) *Tax treatment of corrective distributions*—(A) *General rule.* Except as provided in paragraph (f)(4)(v) (B) or (C) of this section, a corrective distribution of excess contributions (and income) that is made within 2½ months after the end of the plan year for which the excess contributions were made is includible in the employee's gross income on the earliest dates any elective contributions by the employee during the plan year would have been received by the employee had the employee originally elected to receive the amounts in cash. A corrective distribution of excess contributions (and income) that is made more than 2½ months after the end of the plan year for which the contributions were made is includible in the employee's gross income in the employee's taxable year in which distributed. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4980A. See paragraph (f)(5)(i)(B) of this section for rules relating to the taxation of excess contributions that reduce excess deferrals. See paragraph (f)(6)(i) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year.

(B) *Rule for de minimis distributions.* If the total amount of excess contributions and excess aggregate contributions distributed to a recipient under a plan for any plan year is less than $100 (excluding income), a corrective distribution of excess contributions (and income) is includible in the gross income of the recipient in the taxable year of the recipient in which the corrective distribution is made.

(C) *Rule for certain 1987 and 1988 excess contributions.* Distributions for plan years beginning in 1987 and 1988 to which the de minimis rule of this section would otherwise apply may be reported by the recipient, at the recipient's option, either in the year described in paragraph (f)(4)(v)(A) of this section, or in the year described in paragraph (f)(4)(v)(B) of this section. This special rule may be used only for distributions made within 2½ months after the close of the plan year, but in no event later than April 17, 1989.

(vi) *No reduction of required minimum distribution.* A distribution of excess contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9).

(5) *Rules applicable to all corrections*—(i) *Coordination with distribution of excess deferrals*—(A) *In general.* The amount of excess contributions to be recharacterized under paragraph (f)(3) of this section or distributed under paragraph (f)(4) of this section with respect to an employee for a plan year, is reduced by any excess deferrals previously distributed to the employee for the employee's taxable year ending with or within the plan year in accordance with section 402(g)(2).

(B) *Treatment of excess contributions that reduce excess deferrals.* Under § 1.402(g)–1(d), the amount of excess deferrals that may be distributed with respect to an employee for a taxable year is reduced by any excess contributions previously distributed or recharacterized with respect to the employee for the plan year beginning with or within the taxable year. The amount of excess contributions includible in the gross income of the employee, and the amount of excess contributions reported by the payor or plan administrator as includible in the gross income of the employee, does not include the amount of any reduction under § 1.402(g)–1(e)(6).

(ii) *Correction of family members.* The determination and correction of excess contributions of a highly compensated employee whose actual deferral ratio is determined under the family aggregation rules of paragraph (g)(1)(ii)(C) of this section is accomplished by reducing the actual deferral ratio as required under paragraph (f)(2) of this section and allocating the excess contributions for the family group among the family members in proportion to the elective contribution of each family member that is combined to determine the actual deferral ratio.

(iii) *Matching contributions forfeited because of excess deferral or contribution.* For purposes of section 401(k)(2)(C) and paragraph (c)(1) of this section, a qualified matching contribution is not treated as forfeitable merely because under the plan it is forfeited if the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution.

(6) *Failure to correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess contributions within 2½ months after the close of the plan year for which the excess contributions are made, the employer will be liable for a 10-percent excise tax on the amount of the excess contributions. See section 4979 and § 54.4979–1. Qualified nonelective contributions and qualified matching contributions properly taken into account under paragraph (b)(5) of this section for a plan year may enable a plan to avoid having excess contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess contributions are not corrected within 12 months after close of the plan year for which they were made, the cash or deferred arrangement will fail to satisfy the requirements of section 401(k)(3) for the plan year for which the excess contributions are made and all subsequent plan years during which the excess contributions remain in the trust.

(7) *Examples.* The provisions of this paragraph (f) are illustrated by the following examples:

Example 1. (i) The Y corporation maintains a cash or deferred arrangement. The plan year is the calendar year. For plan year 1989, all 10 of Y's employees are eligible to participate in the cash or deferred arrangement. The employees' compensation, elective deferrals, and actual deferral ratios are as shown in the following table:

Employee	Compensation	Elective deferral	Actual deferral ratio (%) (ADR)
A	160,000	6,400	4.0
B	140,000	7,000	5.0
C	70,000	7,000	10.0
D	65,000	6,500	10.0
E	42,000	2,100	5.0
F	35,000	3,500	10.0
G	28,000	2,800	10.0
H	21,000	700	3.33
I	21,000	0	0
J	21,000	0	0

(ii) Employees A, B, C, and D are highly compensated employees. Employees E, F, G, H, I, and J are nonhighly compensated employees. The actual deferral percentage (ADP) for the highly compensated group is 7.25 percent. The ADP for the nonhighly compensated group is 4.72 percent. These percentages do not meet the requirements of section 401(k)(3)(A)(ii).

(iii) Employees A and C have each received a distribution of excess deferrals of $1,000. However, the ADR for employee A remains 4.0 percent and the actual deferral ratio for Employee C remains 10.0 percent. The ADP for the group of highly compensated group remains 7.25 percent.

(iv) The ADP for the highly compensated group must be reduced to 6.72 percent. This is done by reducing the ADR of the highly compensated employees with the highest ADR (Employees C and D) to 8.94 percent. This makes Employee C's maximum elective contribution $6,258. This requires a distribution or recharacterization of $742. But since $1,000 has already been distributed as an excess deferral, no additional distribution or recharacterization is required or permitted. Employee D's elective contribution must be reduced by $689 ($6,500—.0894 ($65,000)) to $5,811 through distribution or recharacterization.

Example 2. A, B, and C are highly compensated employees of Employer R. Employer R maintains a cash or deferred arrangement. For the plan year 1990, A, B, and C each earn $100,000 and contribute $7,000 to the plan during the period January through June. B retires in November of 1990 and makes a withdrawal of B's entire account balance of $200,000. In January of 1991, R computes the ADP test for its employees and learns that the highly compensated employees should have contributed only five percent of compensation. Since B made a contribution of $7,000 for 1990, B's contribution and compensation are used in determining the ADP despite the subsequent $200,000 withdrawal. A, B, and C must each receive a corrective distribution of $2,000 in order to meet the ADP test. Since B has already withdrawn B's total account balance under the plan, only A and C must receive a distribution of $2,000 each in order for the plan to meet the ADP test of section 401(k)(3)(A)(ii). Pursuant to the 1990 Form 1099–R Instructions, the plan must issue two Forms 1099 R to B, one reporting the portion of the distribution that was necessary to correct the excess contribution (including income), and one reporting the balance of the distribution. If B had withdrawn less than the total account balance, B would have to withdraw the lesser of $2,000 or the remaining account balance.

Example 3. Individual A has a child, B. Both participate in a cash or deferred arrangement maintained by Employer X. A is one of the 10 most highly compensated employees and B is a nonhighly compensated employee. A has compensation of $100,000 and defers $7,000 under the cash or deferred arrangement; B has compensation of $40,000 and defers $4,000 under the arrangement. The actual deferral ratio of the family unit is 7.86 percent, calculated by aggregating the contributions and compensation of A and B ($7,000+$4,000)/($100,000+$40,000). For the plan, it is determined that under § 1.401(k)–1(f)(2), the actual deferral ratio of the aggregate family unit must be reduced to 7.20 percent. This reduction is applied in proportion to A's and B's contributions. The excess contributions are $920 ($11,000 total contributions minus $10,080 (7.20%×$140,000)). A's share of the excess contributions is $585.45 ($7,000/$11,000×$920); B's share is $334.55 ($4,000/$11,000×$920).

Example 4. (i) Employer T maintains a profit-sharing plan containing a cash or deferred arrangement for all employees. Six employees are covered by a collective bargaining agreement, the other seven employees are not. The employee data for 1994 is shown in the following table:

Employee	Collective bargaining unit status	Actual deferral ratio (ADR), (percent)
A	Member	8.0
B	Member	6.0
C	Nonmember	9.0
D	Nonmember	7.0
E–H	Members	4.5
I–M	Nonmembers	6.0

Employees A, B, C, and D are highly compensated.

(ii) For purposes of sections 410(b), 401(a)(4) and 401(k), the portion of T's plan covering collectively bargained unit members must be disaggregated from the portion covering other employees.

Employee	ADR (percent)
Collective Bargaining Unit Members:	
A	8.0
B	6.0
E–H	[1] 4.5
Other Employees:	
C	9.0
D	7.0
I–M	[1] 6.0

[1] Average.

(iii) The ADPs for the collectively bargained highly compensated group and nonhighly compensated group, respectively, are seven percent and 4.5 percent. The ADPs for the other highly compensated and nonhighly compensated employees, respectively, are eight percent and six percent.

(iv) The non-collectively bargained portion of the disaggregated plan satisfies the ADP test for the 1994 plan year, but the collectively bargained portion does not. Employer T is not required to make corrections to the collectively bargained portion of the cash or deferred arrangement, because a collectively bargained plan automatically satisfies the nondiscrimination requirements of 401(a)(4). However, unless Employer T corrects the ADP test failure in the collectively bargained portion of the plan, either by reducing A's ADR to seven percent or adding QNCs for the nonhighly compensated employees, all elective contributions made by collectively bargained employees for the year will be includible in income in 1994.

(g) *Definitions.* The following definitions apply for purposes of this section, unless the context clearly indicates otherwise:

(1) *Actual deferral percentage*—(i) *General rule.* The actual deferral percentage for a group of employees for a plan year is the average of the actual deferral ratios of employees in the group for that plan year. For plan years that begin after December 31, 1988, or such later date provided in paragraph (h) of this section, actual deferral ratios and the actual deferral percentage for a group are calculated to the nearest hundredth of a percentage point.

(ii) *Actual deferral ratio*—(A) *General rule.* An employee's actual deferral ratio for the plan year is the sum of the employee's elective contributions and amounts treated as elective contributions for the plan year, divided by the employee's compensation taken into account for the plan year. If an eligible employee makes no elective contributions, and no qualified matching contributions or qualified nonelective contributions are taken into account with respect to the employee, the actual deferral ratio of the employee is zero. See paragraphs (b)(4), (b)(5), and (g)(2) of this section for rules regarding the elective contributions, qualified nonelective contributions, and compensation taken into account in calculating this fraction.

(B) *Employee eligible under more than one arrangement*—(*1*) *Highly compensated employees.* For plan years beginning after December 31, 1984, the actual deferral ratio of a highly compensated employee who is eligible to participate in more than one cash or deferred arrangement of the same employer is generally calculated by treating all the cash or deferred arrangements in which the employee is eligible to participate as one arrangement. However, plans that are not permitted to be aggregated under § 1.401(k)–1(b)(3)(ii)(B) are not aggregated for this purpose, except as specifically provided in § 1.401(m)–2(b)(1). For example, if a highly compensated employee with compensation of $80,000 could make elective contributions under two separate cash or deferred arrangements, the actual deferral ratio for the employee under each arrangement would generally be calculated by dividing the total elective contributions by the employee under both arrangements by $80,000. If one of the cash or deferred arrangements were part of an ESOP, however, while the other

was not, the actual deferral percentage of the employee under each arrangement would be calculated by dividing the employee's elective contributions under each arrangement by $80,000 because the ESOP portion is mandatorily disaggregated from the non-ESOP portion.

(*2*) *Nonhighly compensated employees.* For plan years beginning after December 31, 1984, and before January 1, 1987 (or such later date provided under paragraph (h) of this section), this paragraph (g)(1)(ii)(B) applies to all employees, and not only to highly compensated employees.

(*3*) *Treatment of plans with different plan years.* If the cash or deferred arrangements that are treated as a single arrangement under this paragraph (g)(1)(ii)(B) are parts of plans that have different plan years, the cash or deferred arrangements are treated as a single arrangement with respect to the plan years ending with or within the same calendar year.

(C) *Employees subject to family aggregation rules*—(*1*) *Aggregation of elective contributions and other amounts.* For plan years beginning after December 31, 1986, or any later date provided in paragraph (h) of this section, if an eligible highly compensated employee is subject to the family aggregation rules of section 414(q)(6) because that employee is either a five-percent owner or one of the 10 most highly compensated employees, the combined actual deferral ratio for the family group (which is treated as one highly compensated employee) must be determined by combining the elective contributions, compensation, and amounts treated as elective contributions of all the eligible family members.

(*2*) *Effect on actual deferral percentage of nonhighly compensated employees.* The elective contributions, compensation, and amounts treated as elective contributions of all family members are disregarded for purposes of determining the actual deferral percentage for the group of nonhighly compensated employees.

(*3*) *Multiple family groups.* If an employee is required to be aggregated as a member of more than one family group in a plan, all eligible employees who are members of those family groups that include that employee are aggregated as one family group.

(*2*) *Compensation*—(i) *Years beginning after December 31, 1986.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (h) of this section, the term "compensation" means compensation as defined in section 414(s). The period used to determine an employee's compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year for purposes of this section. An employer may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year for purposes of this section. See also section 401(a)(17).

(ii) *Years beginning before January 1, 1987*—(A) *General rule.* An employee's compensation for a plan year beginning before January 1, 1987, or such later date provided under paragraph (h) of this section, is the amount taken into account under the plan (or plans) in calculating the elective contribution that may be made on behalf of the employee. In a plan that is top-heavy (as defined in section 416), compensation may not exceed $200,000. Compensation may not exclude amounts less than a stated amount, such as the integration level under the plan. Compensation may include all compensation for the plan year, including compensation for the period when an employee was ineligible to make a cash or deferred election.

(B) *Nondiscrimination requirement*—(*1*) If the plan's definition of compensation has the effect of discriminating in favor of employees who are highly compensated, a nondiscriminatory definition shall be determined by the Commissioner.

(*2*) A plan's definition of compensation is treated as nondiscriminatory if the plan defines compensation for a plan year either as—

(*i*) an employee's total nondeferred compensation includible in gross income plus elective contributions under the plan and elective contributions under a plan described in section 125, and/or

(*ii*) an employee's W-2 or total nondeferred compensation includible in gross income.

(3) *Elective contributions.* The term "elective contribution" means employer contributions made to a plan that were subject to a cash or deferred election under a cash or deferred arrangement (whether or not the arrangement is a qualified cash or deferred arrangement under paragraph (a)(4) of this section). No amount that has become currently available to an employee or that is designated or treated, at the time of deferral or contribution, as an after-tax employee contribution may be treated as an elective contribution. See paragraphs (a)(2) and (a)(3) of this section. See also paragraph (a)(6)(iii) of this section for rules relating to the treatment as elective contributions of certain matching contributions made by partnerships.

(4) *Eligible employee*—(i) *General rule.* The term "eligible employee" means an employee who is directly or indirectly eligible to make a cash or deferred election under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (e.g., formal application for participation or consent to payroll withholding) in order to be eligible to make a cash or deferred election for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs the acts. An employee who is unable to make a cash or deferred election because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (e.g., satisfy a minimum period of service requirement) in order to be eligible to make a cash or deferred election for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. See paragraph (e)(5) of this section, however, for certain limits on the use of minimum service requirements. An employee who would be eligible to make elective contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(k)(3) for a plan year even though the employee may not make a cash or deferred election by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1) or 415(e).

(ii) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, upon commencing employment with the employer or upon the employee's first becoming eligible to make a cash or deferred election under any arrangement of the employer, is given the one-time opportunity to elect, and the employee does in fact elect, not to be eligible to make a cash or deferred election under the plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. This rule applies in addition to the rules in paragraphs

(a)(3)(iv) and (a)(6)(ii)(C) of this section relating to the definition of a cash or deferred election.

(5) *Employee.* The term "employee" means an individual who performs services for the employer who is either a common law employee of the employer, a self-employed individual who is treated as an employee pursuant to section 401(c)(1), or a leased employee who is treated as an employee of the employer-recipient pursuant to the provisions of section 414(n)(2) or section 414(o)(2), other than individuals who are excluded by reason of section 414(n)(5). Individuals that an employer treats as employees under section 414(n), pursuant to the requirements of section 414(o), are considered to be leased employees for purposes of this rule.

(6) *Employer.* The term "employer" means the employer maintaining the plan and those employers required to be aggregated with the employer under section 414 (b), (c), (m), or (o). An individual who owns the entire interest of an unincorporated trade or business is treated as an employer. Also, a partnership is treated as the employer of each partner and each employee of the partnership.

(7) *Excess contributions and excess deferrals*—(i) *Excess contributions.* The term "excess contribution" means, with respect to a plan year, the excess of the elective contributions, including qualified nonelective contributions and qualified matching contributions that are treated as elective contributions under paragraph (b)(2) of this section, on behalf of eligible highly compensated employees for the plan year over the maximum amount of the contributions permitted under paragraph (b)(2) of this section. The amount of excess contributions for each highly compensated employee is determined by using the method described in paragraph (f)(2) of this section.

(ii) *Excess deferrals.* The term "excess deferrals" means excess deferrals as defined in § 1.402(g)–1(e)(3).

(8) *Highly compensated employees*—(i) *Plan years beginning after December 31, 1986.* For plan years beginning after December 31, 1986, or such later date provided under paragraph (h) of this section, the term "highly compensated employee" has the meaning provided in section 414(q).

(ii) *Plan years beginning after December 31, 1979 and before January 1, 1987.* For plan years beginning after December 31, 1979, and before January 1, 1987, or such later date provided under paragraph (h) of this section, for purposes of the actual deferral percentage test, highly compensated employees are the one-third of all eligible employees (rounded to the nearest integer) who receive the most compensation. When one or more employees of a group would be highly compensated employees except that each member of the group receives the same amount of compensation, the employer must designate which employees of the group are highly compensated, so that one-third of all eligible employees are considered highly compensated.

(9) *Matching contributions.* The term "matching contribution" means matching contributions as defined in § 1.401(m)–1(f)(12).

(10) *Nonelective contributions.* The term "nonelective contribution" means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

(11) *Plan*—(i) *General rule.* The term "plan" refers to a plan described in section 401(a) that includes one or more trusts intended to be exempt from tax under section 501(a) and to an annuity plan described in section 403(a). As described in paragraph (g)(11)(ii) of this section, each single plan under section 414(l) is to be treated as a single plan. Furthermore, as described in paragraph (g)(11)(iii) of this section certain single plans must be treated as comprising separate plans, each of which is a single plan.

(ii) *Separate asset pools are separate plans.* Each single plan within the meaning of section 414(l) is a separate plan. See § 1.414(l)–1(b). A single plan under section 414(l) is a single plan notwithstanding that the plan comprises separate written documents and separate trusts, each of which have received separate determination letters from the Internal Revenue Service. A plan does not comprise separate plans merely because it includes more than one trust or it provides for separate accounts and permits employees to direct the investment of the amounts allocated to their accounts. Further, a plan does not comprise separate plans merely because assets are separately invested in individual insurance or annuity contracts for employees.

(iii) *Mandatory disaggregation of certain plans*—(A) *Plans benefiting collective bargaining unit employees.* A plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not included in such a collective bargaining unit is treated as comprising separate plans. This paragraph (g)(11)(iii)(A) is applied separately with respect to each collective bargaining unit. Thus, for example, if a plan benefits employees in three categories—employees included in collective bargaining unit A, employees included in collective bargaining unit B, and employees who are not included in any collective bargaining unit—the plan is treated as comprising three separate plans, each of which benefits only one category of employees. Similarly, if a plan benefits only employees who are included in collective bargaining unit A and collective bargaining unit B, the plan is treated as comprising two separate plans.

(B) *ESOPs and non-ESOPs.* The portion of a plan that is an employee stock ownership plan described in section 4975(e) or 409 (an ESOP) and the portion of the plan that is not an ESOP are treated as separate plans, except as otherwise permitted under § 54.4975–11(e) of this chapter. Notwithstanding § 54.4975–11(a)(5) of this chapter, an employer may treat the rule in this paragraph (g)(11)(iii)(B) as not effective for plan years beginning before January 1, 1990.

(C) *Plans benefiting employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b), the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the portions of the same plan that benefit employees of the other qualified separate lines of business of the employer.

(D) *Plans maintained by more than one employer*—(*1*) *Multiple employer plans.* If a plan benefits employees of more than one employer, and the employees are not included in a unit of employees covered by a collective bargaining agreement (a multiple employer plan), the plan is treated as comprising separate plans each of which is maintained by a separate employer.

(*2*) *Multiemployer plans.* The portion of a plan that benefits employees who are included in a collective bargaining unit, the portion of the plan that benefits employees who are included in another collective bargaining unit and the portion of the plan that benefits non-collective bargaining unit employees are all treated as separate plans. Consistent with section 413(b), the portion of the plan that is maintained pursuant to a collective bargaining agreement is treated as a single plan maintained by a single employer that employs all the employees benefiting under the same benefit computation formula and covered pursuant to that collective bargaining agreement. The

noncollectively bargained portion of the plan is treated as maintained by one or more employers, depending on whether the non-collective bargaining unit employees who benefit under the plan are employed by one or more employers.

(iv) *Mandatory aggregation of certain plans.* See §§ 1.401(k)–1(b)(3)(ii) and 1.401(m)–1(b)(3)(i) for additional rules requiring separate plans to be treated as a single plan in some cases.

(12) *Pre-ERISA money purchase pension plan*—(i) A pre-ERISA money purchase pension plan is a pension plan:

(A) That is a defined contribution plan (as defined in section 414(i));

(B) That was in existence on June 27, 1974, and as in effect on that date, included a salary reduction agreement described in paragraph (a)(3)(i) of this section; and

(C) Under which neither the employee contributions nor the employer contributions, including elective contributions, may exceed the levels (as a percentage of compensation) provided for by the contribution formula in effect on June 27, 1974.

(ii) A plan was in existence on June 27, 1974, if it was a written plan adopted on or before that date, even if no funds had yet been paid to the trust associated with the plan.

(13) *Qualified matching contributions and qualified nonelective contributions*—(i) *Qualified matching contributions.* The term "qualified matching contribution" means matching contributions that satisfy the additional requirements of paragraph (g)(13)(iii) of this section.

(ii) *Qualified nonelective contributions.* The term "qualified nonelective contribution" means employer contributions, other than elective contributions and matching contributions, that satisfy the additional requirements of paragraph (g)(13)(iii) of this section.

(iii) *Additional requirements.* Except to the extent that paragraphs (c) and (d) of this section specifically provide otherwise, the matching contributions and the nonelective contributions must satisfy the requirements of paragraphs (c) and (d) of this section as though the contributions were elective contributions, without regard to whether the contributions are actually taken into account as elective contributions under paragraph (b)(2) of this section. Thus, the matching and nonelective contributions must satisfy the vesting requirements of paragraph (c) of this section and be subject to the distribution requirements of paragraph (d) of this section when they are contributed to the plan. See § 1.401(k)–1(f)(5)(iii) for rules regarding matching contributions not treated as forfeitable under section 411(a)(3)(G) because of excess deferrals or contributions.

(14) *Rural cooperative plan.* For purposes of this section, a rural cooperative plan is a plan described in section 401(k).

(h) *Effective dates*—(1) *General rule.* Except as otherwise provided in this paragraph (h) or as specifically provided elsewhere in this section, this section applies to plan years beginning after December 31, 1979.

(2) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986:

(i) The provisions of this section first effective for plan years beginning after December 31, 1986, do not apply to years that begin before the earlier of January 1, 1989, or the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986).

(ii) The provisions of this section first effective for plan years beginning after December 31, 1988, do not apply to years beginning before the earlier of:

(A) The later of January 1, 1989, or the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986); or

(B) January 1, 1991.

(3) *Transition rules*—(i) *Cash or deferred arrangements in existence on June 27, 1974.* See § 1.402(a)–1(d)(3)(ii) for a transition rule applicable to cash or deferred arrangements in existence on June 27, 1974.

(ii) *Plan years beginning after December 31, 1979, and before January 1, 1992.* For plan years beginning after December 31, 1979 (or, in the case of a pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1992, a reasonable interpretation of the rules set forth in section 401 (k) and (m) of the Internal Revenue Code (as in effect during those years) may be relied upon to determine whether a cash or deferred arrangement was qualified during those years.

(iii) *Restructuring*—(A) *General rule.* In determining whether the requirements of section 401(k) is satisfied for plan years beginning before January 1, 1992, a plan may be treated as consisting of two or more component plans, each consisting of all of the allocations and other benefits, rights, and features provided to a group of employees under the plan. An employee may not be included in more than one component plan of the same plan for a plan year under this method. If this method is used for a plan year, the requirements of section 401(k) is applied separately with respect to each component plan for the plan year. Thus, for example, the actual deferral ratio and the amount of excess contributions, if any, of each eligible employee under each component plan must be determined as if the component plan were a separate plan. This method applies solely for purposes of section 401(k). Thus, for example, the requirements of section 410(b) must still be satisfied by the entire plan.

(B) *Identification of component plans*—(*1*) *Minimum coverage requirement.* The group of eligible employees described in § 1.401(k)–1(g)(4) under each component plan must separately satisfy the requirements of section 410(b) as if the component plan were a separate plan. Component plans may not be aggregated to satisfy this requirement.

(*2*) *Commonality requirement.* The group of employees used to identify a component plan must share some common attribute or attributes, other than similar actual deferral ratios. Permissible common attributes include, for example, employment at the same work site, in the same job category, for the same division or subsidiary, or for a unit acquired in a specific merger or acquisition, employment for the same number of years, compensation under the same method (e.g., salaried or hourly), coverage under the same contributions formula, and attributes that could be used as the basis of a classification that would be treated as reasonable under the average benefit percentage test of section 410(b)(1)(C) and (b)(2). Employees whose only common attribute is the same or similar actual deferral ratios, or another attribute having substantially the same effect as the same or similar actual deferral ratios, are not considered as sharing a common attribute for this purpose. This rule applies regardless of whether the component plan or the plan of which it is a part satisfies the ratio or percentage test of section 410(b).

(4) *State and local government plans*—(i) *Plans adopted before May 6, 1986.* A plan adopted by a state or local government prior to May 6, 1986, is subject to the transitional rules of paragraph (h)(4) (ii) or (iii) of this section.

(ii) *Plan years beginning before January 1, 1993.* The following rules apply for plan years beginning before January 1, 1993, to a governmental plan described in section 414(d) that is not a collectively bargained plan and includes

a nonqualified cash or deferred arrangement:

(A) The plan does not fail to satisfy the requirements of section 401(a) merely because of the nonqualified cash or deferred arrangement.

(B) Employer contributions under the nonqualified cash or deferred arrangement are considered to satisfy the requirements of section 401(a)(4).

(C) Except as provided in paragraphs (a)(7) and (f) of this section, elective contributions under the arrangement are treated as employer contributions under the Internal Revenue Code of 1986, as if the arrangement were a qualified cash or deferred arrangement. See § 1.401(k)-1(a)(4)(ii). See § 1.402(a)-1(d) for rules governing when elective contributions under the arrangement are includible in an employee's gross income.

(iii) *Collectively bargained plans.* The transition rules in paragraph (h)(4)(ii) of this section apply to a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers and adopted by a state or local government before May 6, 1986, effective on the date the provisions of section 401(k) and this section would be effective under paragraph (h)(2) of this section.

Par. 4. New §§ 1.401(m)-0 through 1.401(m)-2 are added to read as follows:

§ 1.401(m)-0 Employee and matching contributions, table of contents.

This section contains the captions that appear in §§ 1.401(m)-1 and 1.401(m)-2.

§ 1.401(m)-1 Employee and matching contributions.

§ 1.401(m)-2 Multiple Use of alternative limitation.

§ 1.401(m)-1 Employee and matching contributions.

(a) *General rules*—(1) *Nondiscriminatory amount of contributions.* A defined contribution plan does not satisfy section 401(a)(4) for a plan year unless the amount of employee and matching contributions to the plan for the plan year satisfies section 401(a)(4). Except as specifically provided otherwise, for plan years beginning after December 31, 1986, (or such later date provided in paragraph (g) of this section) the amount of employee and matching contributions under a plan satisfies the requirements of section 401(a)(4) only if the employee and matching contributions under the plan satisfy the actual contribution percentage test of section 401(m)(2) and paragraph (b) of this section. For this purpose, the employee and matching contributions are combined with the elective and qualified nonelective contributions, if any, that are treated as matching contributions, and the recharacterized elective contributions, if

any, that are treated as employee contributions for purposes of section 401(m).

(2) *Other nondiscrimination rules.* Nondiscrimination requirements in addition to those described in paragraph (a)(1) of this section apply to employee and matching contributions under section 401(a)(4). For example, under section 401(a)(4) a plan may not discriminate with respect to the availability of benefits, rights, and features under the plan. The right to make each level of employee contributions, and the right to each level of matching contributions, are benefits, rights, or features subject to this requirement, and each level must therefore generally be available to a group of employees that satisfies section 410(b). Thus, for example, a plan does not satisfy section 401(a)(4) if it provides a higher rate of matching contributions for highly compensated employees than for nonhighly compensated employees. See paragraph (e)(4) of this section for rules relating to the application of section 401(a)(4) to the correction of excess aggregate contributions.

(3) *Rules applicable to collectively bargained plans.* The requirements of this section are treated as satisfied by employee and matching contributions under a collectively bargained plan (or the portion of a plan) that automatically satisfies section 410(b).

(b) *Actual contribution percentage test*—(1) *General rule.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, the actual contribution percentage test is satisfied if:

(i) The actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage for the group of all other eligible employees multiplied by 1.25; or

(ii) The excess of the actual contribution percentage for the group of eligible highly compensated employees over the actual contribution percentage for the group of all other eligible employees is not more than two percentage points, and the actual contribution percentage for the group of eligible highly compensated employees is not more than the actual contribution percentage for the group of all other eligible employees multiplied by two.

(2) *Plan provision requirement.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, a plan that permits employee or matching contributions does not satisfy the requirements of section 401(a) unless it provides that the actual contribution percentage test of section 401(m)(2) will be met. For purposes of this paragraph (b)(2), the plan may incorporate the provisions of section 401(m)(2), this paragraph (b), and, if applicable, section 401(m)(9) and § 1.401(m)–2.

(3) *Aggregation of plans*—(i) *General rule.* Plans that are aggregated for purposes of section 410(b) (other than the average benefit percentage test) are treated as a single plan for purposes of section 401(m) and this section. For example, if an employer provides matching contributions under separate profit-sharing plans for its salaried and hourly employees, and treats them as a single plan for purposes of section 410(b), the plans are treated as a single plan for purposes of section 401(m) and this section. See also paragraph (f)(1)(ii) of this section for rules requiring the aggregation of contributions under two or more plans in computing the actual contribution ratios of highly compensated employees.

(ii) *Prohibited aggregation.* Section 410(b) provides the exclusive means of aggregating plans for purposes of this section. For example, allocations under a plan or portion of a plan described in section 4975(e)(7) or 409 (an ESOP) may not be combined with contributions or allocations under any plan or portion of a plan not described in section 4975(e)(7) or 409 (a non-ESOP) for purposes of determining whether either the ESOP or the non-ESOP satisfies the requirements of section 401(m). Similarly, in the case of a plan maintained by more than one employer to which section 413(c) applies, section 401(m) and this section must be applied as if each employer maintained a separate plan. Also, a plan covering both employees who are included in a unit of employees covered by a collective bargaining agreement and employees who are not so covered must be treated as two separate plans (one for each group of eligible employees) for •purposes of section 401(m). Further, two plans may not be aggregated unless they have the same plan year. In addition, plans that are not actually aggregated for a year for purposes of section 410(b) (other than the average benefit percentage test) may not be aggregated for purposes of this section.

(iii) *Restructuring.* Effective for plan years beginning after December 31, 1991, restructuring may not be used to demonstrate compliance with the requirements of section 401(m). For plan years beginning before January 1, 1992, see § 1.401(k)–1(h)(3)(iii).

(4) *Employee and matching contributions taken into account under the actual contribution percentage test*—(i) *Employee contributions*—(A) *General rule.* An employee contribution is taken into account under paragraph (b)(1) of this section for the plan year in which the contribution is made to the trust. For this purpose, a payment by the employee to an agent of the plan is treated as a contribution to the trust at the time of payment to the agent if the funds paid are transmitted to the trust within a reasonable period after the payment to the agent.

(B) *Recharacterized elective contributions.* An excess contribution that is recharacterized under § 1.401(k)–1(f)(3) is taken into account as an employee contribution for the plan year that includes the time at which the excess contribution is includible in the gross income of the employee under § 1.401(k)–1(f)(3)(ii).

(ii) *Matching contributions*—(A) *General rule.* A matching contribution is taken into account under paragraph (b)(1) of this section for a plan year only if the contribution is allocated to the employee's account under the terms of the plan as of any date within the plan year, is actually paid to the trust no later than 12 months after the close of the plan year, and is made on behalf of an employee on account of the employee's elective contributions or employee contributions for the plan year. Matching contributions that do not satisfy these requirements are not taken into account under paragraph (b)(1) of this section for any plan year. Instead, the amount of these matching contributions must satisfy the requirements of section 401(a)(4) (without regard to the special nondiscrimination rule in paragraph (b)(1) of this section) for the plan year for which they are allocated under the plan, as if they were nonelective contributions and were the only nonelective employer contributions for that year.

(B) *Matching contributions used to satisfy actual deferral percentage test.* A matching contribution that is treated as an elective contribution is subject to the actual deferral percentage test of section 401(k)(3) and is not taken into account under paragraph (b)(1) of this section. See § 1.401(k)–1(b)(5)(iii) for the rule relating to years before January 1, 1987.

(C) *Treatment of forfeited matching contributions.* A matching contribution that is forfeited to correct excess aggregate contributions, or because the contribution to which it relates is treated as an excess contribution, excess deferral, or excess aggregate contribution, is not taken into account under paragraph (b)(1) of this section.

(5) *Qualified nonelective contributions and elective contributions that may be taken into account under the actual contribution percentage test.* Except as specifically provided otherwise, for purposes of paragraph (b)(1) of this section, all or part of the qualified nonelective contributions and elective contributions made with respect to any or all employees who are eligible employees under the plan of the employer being tested may be treated as matching contributions provided that each of the following requirements (to the extent applicable) is satisfied:

(i) The amount of nonelective contributions, including those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test, satisfies the requirements of section 401(a)(4).

(ii) The amount of nonelective contributions, excluding those qualified nonelective contributions treated as matching contributions for purposes of the actual contribution percentage test and those qualified nonelective contributions treated as elective contributions under § 1.401(k)–1(b)(5) for purposes of the actual deferral percentage test, satisfies the requirements of section 401(a)(4).

(iii) The elective contributions, including those treated as matching contributions for purposes of the actual contribution percentage test, satisfy the requirements of section 401(k)(3).

(iv) The qualified nonelective contributions are allocated to the employee under the plan as of a date within the plan year (within the meaning of § 1.401(k)–1(b)(4)(i)(A)), and the elective contributions satisfy § 1.401(k)–1(b)(4)(i) for the plan year.

(v) For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, the plan that takes qualified nonelective contributions and elective contributions into account in determining whether employee and matching contributions satisfy the requirements of section 401(m)(2)(A), and the plans to which the qualified nonelective contributions and elective contributions are made, are or could be aggregated for purposes of section 410(b) (other than the average benefit percentage test). If the plan year of the plan being tested is changed to satisfy the requirement under section 410(b) that the aggregated plans have the same plan year, the elective contributions may be taken into account in the resulting short plan year only if these contributions satisfy the requirements of § 1.401(k)–1(b)(4) with respect to the short year, and the qualified nonelective contributions may be taken into account in the resulting short plan year only if these contributions satisfy the requirements of § 1.401(k)–1(b)(4)(i)(A) with respect to the short year as if they were elective contributions.

(c) *Additional requirements*—(1) *Coordination with other plans.* Except as expressly permitted under section 401(k) or 401(m), for plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, employee or matching contributions (or qualified nonelective or elective contributions treated as matching contributions under paragraph (b)(5) of this section) generally may not be taken into account for purposes of determining whether any other contributions under any plan (including the plan to which the employee or matching contributions are made) satisfy the requirements of section 401(a). Matching contributions and qualified nonelective contributions may be used to enable a plan to satisfy the minimum contribution or benefit requirements under section 416, but matching contributions that are used in this way generally may no longer be treated as matching contributions, and must therefore satisfy the nondiscrimination requirements of section 401(a)(4) without regard to section 401(k) or 401(m). See § 1.416–1, M–18 and M–19 and paragraph (f)(12)(iii) of this section. See also § 1.401(k)–1(b)(5) for circumstances under which matching contributions may be used to determine whether a plan satisfies the requirements of section 401(k). This paragraph does not apply for purposes of determining whether a plan satisfies the average benefit percentage test of section 410(b)(2)(A)(ii).

(2) *Recordkeeping requirement.* A plan satisfies this section only if the employer maintains the records necessary to demonstrate compliance with the applicable nondiscrimination requirements of paragraph (b) of this section, including records showing the extent to which qualified nonelective contributions and elective contributions are taken into account.

(d) *Examples.* The provisions of paragraphs (a) through (c) of this section are illustrated by the following examples. Assume in each case that the employer is a corporation, and that the employer's taxable year and plan year are the calendar year. Also assume that the employee contributions, elective contributions, matching contributions and qualified nonelective contributions meet the applicable requirements of sections 401(a)(4) and 410. For methods to be used to correct excess aggregate contributions, see paragraph (e) of this section.

Example 1. (i) Employer L maintains a profit-sharing plan providing for voluntary employee contributions. L does not maintain a plan that includes a cash or deferred arrangement. For the 1988 plan year, the actual contribution percentages (ACPs) for the highly compensated employees and nonhighly compensated employees are shown in the following chart:

	Actual contribution percentage
Highly compensated	10
Nonhighly compensated	5

(ii) This plan fails to qualify under either of the tests of section 401(m)(2)(A) because the ACP for highly compensated employees is more than 125 percent of the ACP for nonhighly compensated employees, and exceeds the ACP for the nonhighly compensated employees by more than two percentage points. L must either reduce the ACP for the highly compensated employees to seven percent (to satisfy the 200 percent/two percentage point test) or increase the ACP of the nonhighly compensated employees to eight percent (to satisfy the 125 percent test).

Example 2. (i) Employer M maintains a plan under which each dollar of employee contributions is matched with $.50 of employer contributions. M maintains no other plan. For the 1988 plan year, the average percentage of compensation contributed to the plan for the employees is shown in the following chart:

	Employee contributions (percent)	Matching contributions (percent)	Actual contribution percentage
Highly compensated	10	5	15
Nonhighly compensated	5	2.5	7.5

(ii) This plan fails to satisfy either of the tests of section 401(m)(2)(A). Employer M must either reduce the actual contribution percentage of the highly compensated employees to 9.5 percent (to satisfy the 200 percent/two percentage point test) or increase the actual contribution percentage of the nonhighly compensated employees to 12 percent (to satisfy the 125 percent test).

Example 3. (i) Employer N maintains a plan that contains a cash or deferred arrangement and permits employee contributions. For the 1988 plan year, the average percentages of compensation contributed to the plan by the highly compensated and nonhighly compensated employees as elective deferrals and employee contributions are shown in the chart below. Elective contributions meet the requirements of paragraph (b)(5) of this section.

	Elective contributions (percent)	Employee contributions (percent)
Highly compensated	10	10
Nonhighly compensated	10	6

(ii) The plan fails to meet the requirements of section 401(m) because the actual contribution percentage (ACP) of highly compensated employees is more than 125 percent of the ACP of the other employees, and exceeds the ACP of the other employees by more than two percentage points.

(iii) The plan provides that elective contributions made by nonhighly compensated employees may be used to meet the requirements of section 401(m) to the extent needed under that section. Under this provision, the plan uses elective contributions equal to two percent of the compensation of the nonhighly compensated employees in the ACP test. After this adjustment, the actual deferral percentages (ADPs) and ACPs are as follows:

	ADP (percent)	ACP (percent)
Highly compensated	10	10
Nonhighly compensated	8	8

(iv) The ACP of the highly compensated employees meets the requirements of section 401(m)(2)(A)(i) because it is 125 percent of that for nonhighly compensated employees. The ADP of the highly compensated employees similarly satisfies the 125 percent test. The plan would also meet the requirements of section 401(m) if all elective contributions were used in the ACP test. This is because the ACP for the highly compensated employees (20 percent) would be 125 percent of the ACP for the nonhighly compensated employees (16 percent).

Example 4. (i) Employer P maintains a plan that includes a cash or deferred arrangement. Elective contributions, qualified nonelective contributions (QNCs), employee contributions, and matching contributions are made to the plan. The elective contributions and QNCs meet the requirements of paragraph (b)(5) of this section. For the 1989 plan year, the QNCs, elective contributions, and employee and matching contributions are shown in the following table:

	QNCs (percent)	Elective contributions (percent)	Employee/ matching contributions (percent)
Highly compensated	3	5	6
Nonhighly compensated	3	4	2

(ii) The elective contributions meet the test of section 401(k)(3)(A)(ii). The employee and matching contributions, however, do not meet the actual contribution percentage (ACP) test. P may not use any QNCs of the nonhighly compensated employees to meet the ACP test because the remaining QNCs would discriminate in favor of the highly compensated employees. However, P could make additional QNCs or matching contributions of two percent of compensation on behalf of the nonhighly compensated employees. Alternatively, P could treat all QNCs for all employees and elective contributions equal to one percent of compensation for nonhighly compensated employees as matching contributions and make additional QNCs of 1.2 percent of compensation on behalf of nonhighly compensated employees. The ACPs for highly and nonhighly compensated employees would then be nine percent and 7.2 percent, respectively, thus satisfying the 125 percent test. The actual deferral percentages would be five and three percent, respectively, which would satisfy the 200 percent/two percentage point test.

Example 5. (i) Employer P maintains a cash or deferred arrangement. Elective contributions, qualified nonelective contributions (QNCs), employee contributions, and matching contributions are made to the plan. The elective contributions and the QNCs meet the requirements of paragraph (b)(5) of this section. For the 1989 plan year, the contributions are shown in the following table:

	QNCs (percent)	Elective contributions (percent)	Employee/ matching contributions (percent)
Highly compensated	0	6	6
Nonhighly compensated	3	3	3

(ii) The QNCs may be used in the actual deferral percentage (ADP) test, the actual contribution percentage (ACP) test, or a combination of the two. If P treats one-third of the QNCs as elective contributions and two-thirds as matching contributions, the ADPs for the highly compensated and nonhighly compensated employees are six and four percent, respectively, and satisfy the 200 percent/two percentage point test. Similarly, the ACPs for the two groups are six and five percent, respectively, and satisfy the 125 percent test.

(e) *Correction of excess aggregate contributions*—(1) *General rule*—(i) *Permissible correction methods.* A plan satisfies the requirements of section 401(m)(2) and paragraph (b)(1) of this section with respect to the amount of employee and matching contributions under the plan if the employer, in accordance with the terms of the plan and paragraph (b)(5) of this section, makes qualified nonelective contributions or elective contributions that, in combination with employee and matching contributions, satisfy the actual contribution percentage test. In addition, a plan subject to the requirements of section 401(m) satisfies section 401(m)(2) and paragraph (b)(1) of

this section if, in accordance with the terms of the plan, excess aggregate contributions on behalf of highly compensated employees (and the income allocable to these contributions) are distributed in accordance with paragraph (e)(3) of this section. Matching contributions (and the income allocable to matching contributions) that are not vested (determined without regard to any increase in vesting that may occur after the date of the forfeiture) may also be forfeited to correct excess aggregate contributions. Finally, a plan may limit employee or matching contributions in a manner that prevents excess aggregate contributions from being made.

(ii) *Combination of correction methods.* The plan may permit a combination of the methods listed in paragraph (e)(1)(i) of this section to avoid or correct excess aggregate contributions.

(iii) *Impermissible correction methods.* Excess aggregate contributions may not be corrected by forfeiting vested matching contributions, recharacterizing matching contributions, or not making matching contributions required under the terms of the plan. Excess aggregate contributions for a plan year may not remain unallocated or be allocated to a suspense account for allocation to one or more employees in any future year. See paragraph (e)(5) of this section for the effect of a failure to correct excess aggregate contributions. See § 1.411(a)–4(b)(7) regarding permissible forfeitures of matching contributions.

(iv) *Partial correction.* Any distribution of less than the entire amount of excess aggregate contributions (and income) is treated as a pro rata distribution of excess aggregate contributions and income.

(2) *Amount of excess aggregate contributions*—(i) *General rule.* The amount of excess aggregate contributions for a highly compensated employee for a plan year is the amount (if any) by which the employee's employee and matching contributions must be reduced for the employee's actual contribution ratio to equal the highest permitted actual contribution ratio under the plan. To calculate the highest permitted actual contribution ratio under a plan, the actual contribution ratio of the highly compensated employee with the highest actual contribution ratio is reduced by the amount required to cause the employee's actual contribution ratio to equal the ratio of the highly compensated employee with the next highest actual contribution ratio. If a lesser reduction would enable the arrangement to satisfy the actual contribution percentage test, only this lesser reduction may be made. This process must be repeated until the plan satisfies the actual contribution percentage test. The highest actual contribution ratio remaining under the plan after leveling is the highest permitted actual contribution ratio. For each highly compensated employee, the amount of excess aggregate contributions for a plan year is equal to the total employee and matching contributions, plus qualified nonelective contributions and elective contributions taken into account in determining the employee's actual contribution ratio under paragraph (f)(1) of this section, minus the amount determined by multiplying the employee's actual contribution ratio (determined after application of this paragraph (e)(2)) by the compensation used in determining the ratio. In no case may the amount of excess aggregate contributions with respect to any highly compensated employee exceed the amount of employee and matching contributions made on behalf of the highly compensated employee for the plan year.

(ii) *Coordination with correction of excess contributions.* The amount of excess aggregate contributions with respect to an employee for a plan year is calculated after determining the excess contributions to be recharacterized as employee contributions for the plan year.

(iii) *Correction of family members.* The determination and correction of excess aggregate contributions of a highly compensated employee whose actual contribution ratio is determined under the family aggregation rules of paragraph (f)(1)(ii)(C) of this section, is accomplished by reducing the actual contribution ratio as required under this paragraph (e)(2) and allocating the excess aggregate contributions for the family group among the family members in proportion to the employee and matching contributions of each family member that are combined to determine the actual contribution ratio.

(3) *Corrective distribution of excess aggregate contributions (and income)*—(i) *General rule.* Excess aggregate contributions (and income allocable thereto) are distributed in accordance with this paragraph (e)(3) only if the excess aggregate contributions and allocable income are designated by the employer as a distribution of excess aggregate contributions (and income), and are distributed to the appropriate highly compensated employees after the close of the plan year in which the excess aggregate contributions arose and within 12 months after the close of that plan year. In the event of a complete termination of the plan during the plan year in which an excess aggregate contribution arose, the corrective distribution must be made as soon as administratively feasible after the date of termination of the plan, but in no event later than 12 months after the date of termination. If the entire account balance of a highly compensated employee is distributed during the plan year in which the excess aggregate contribution arose, the distribution is deemed to have been a corrective distribution of excess aggregate contributions (and income) to the extent that a corrective distribution would otherwise have been required.

(ii) *Income allocable to excess aggregate contributions*—(A) *General rule.* The income allocable to excess aggregate contributions is equal to the sum of the allocable gain or loss for the plan year and, if the plan so provides, the allocable gain or loss for the period between the end of the plan year and the date of distribution (the "gap period").

(B) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess aggregate contributions, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under the plan for the plan year, and is used by the plan for allocating income to participants' accounts.

(C) *Alternative method of allocating income.* A plan may allocate income to excess aggregate contributions by multiplying the income for the plan year (and the gap period, if the plan so provides) allocable to employee contributions, matching contributions, and amounts treated as matching contributions by a fraction. The numerator of the fraction is the excess aggregate contributions for the employee for the plan year. The denominator of the fraction is equal to the sum of:

(*1*) The total account balance of the employee attributable to employee and matching contributions, and amounts treated as matching contributions as of the beginning of the plan year; plus

(*2*) The employee and matching contributions, and amounts treated as matching contributions for the plan year and for the gap period if gap period income is allocated.

(D) *Safe harbor method of allocating gap period income.* Under the safe harbor method, income on excess aggregate contributions for the gap period is equal to 10 percent of the

income allocable to excess aggregate contributions for the plan year (calculated under the method described in paragraph (e)(3)(ii)(C) of this section), multiplied by the number of calendar months that have elapsed since the end of the plan year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of the month is treated as made on the last day of the preceding month. A distribution made after the fifteenth day of the month is treated as made on the first day of the next month.

(E) *Allocable income for recharacterized elective contributions.* If recharacterized elective contributions are distributed as excess aggregate contributions, the income allocable to the excess aggregate contributions is determined as if recharacterized elective contributions had been distributed as excess contributions. Thus, income must be allocated to the recharacterized amounts distributed using the methods in § 1.401(k)–1(f)(4)(ii).

(iii) *No employee or spousal consent required.* A distribution of excess aggregate contributions (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) and 417.

(iv) *Treatment of corrective distributions and forfeited contributions as employer contributions.* Excess aggregate contributions, including forfeited matching contributions, are treated as employer contributions for purposes of sections 404 and 415 even if distributed from the plan. Forfeited matching contributions that are reallocated to the accounts of other participants for the plan year in which the forfeiture occurs are treated under section 415 as annual additions for the participants to whose accounts they are reallocated and for the participants from whose accounts they are forfeited.

(v) *Tax treatment of corrective distributions*—(A) *General rule.* Except as otherwise provided in this paragraph (e)(3)(v), a corrective distribution of excess aggregate contributions (and income) that is made within 2½ months after the end of the plan year for which the excess aggregate contributions were made is includible in the employee's gross income for the taxable year of the employee ending with or within the plan year for which the excess aggregate contributions were made. A corrective distribution of excess aggregate contributions (and income) that is made more than 2½ months after the plan year for which the excess aggregate contributions were made is includible in the employee's gross income in the taxable year of the employee in which distributed. The portion of the distribution that is treated as an investment in the contract under section 72 is determined without regard to any plan contributions other than those distributed as excess aggregate contributions. Regardless of when the corrective distribution is made, it is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4980A. See paragraph (e)(5) of this section for additional rules relating to the employer excise tax on amounts distributed more than 2½ months after the end of the plan year.

(B) *Rule for de minimis distributions.* If the total excess contributions and excess aggregate contributions distributed to a recipient under a plan for any plan year are less than $100 (excluding income), a corrective distribution of excess aggregate contributions (and income) is includible in gross income in the recipient's taxable year in which the corrective distribution is made.

(C) *Rule for certain 1987 and 1988 excess aggregate contributions.* Distributions for plan years beginning in 1987 and 1988 to which the de minimis rule of this paragraph (e)(3)(v) of this section would otherwise apply may be reported by the recipient, at the recipient's option, either in the year described in paragraph (e)(3)(v)(A) of this section, or in the year described in paragraph (e)(3)(v)(B) of this section. This special rule may be used only for distributions made within 2½ months after the close of the plan year, but not later than April 17, 1989.

(vi) *No reduction of required minimum distribution.* A distribution of excess aggregate contributions (and income) is not treated as a distribution for purposes of determining whether the plan satisfies the minimum distribution requirements of section 401(a)(9).

(4) *Coordination with section 401(a)(4).* The method of distributing excess aggregate contributions provided in the plan must satisfy the requirements of section 401(a)(4). This requires that after correction each level of matching contributions be effectively available to a group of employees that satisfies section 410(b). Thus, a plan under which employee contributions are distributed under this paragraph (e) to highly compensated employees to the extent needed to meet the requirements of section 401(m)(2), while matching contributions attributable to employee contributions remain allocated to the highly compensated employees' accounts does not meet the requirements of section 401(a)(4). A method of distributing excess aggregate contributions will not be considered discriminatory solely because, in accordance with the terms of the plan, unmatched employee contributions that exceed the highest rate at which employee contributions are matched are distributed before matched employee contributions, or matching contributions are distributed (or forfeited) prior to employee contributions. See Example 6 in paragraph (e)(6) of this section.

(5) *Failure to correct*—(i) *Failure to correct within 2½ months after end of plan year.* If a plan does not correct excess aggregate contributions within 2½ months after the close of the plan year for which the excess aggregate contributions are made, the employer will be liable for a 10 percent excise tax on the amount of the excess aggregate contributions. See section 4979 and § 54.4979–1. Qualified nonelective contributions properly taken into account under paragraph (b)(5) of this section for a plan year may enable a plan to avoid having excess aggregate contributions, even if the contributions are made after the close of the 2½ month period.

(ii) *Failure to correct within 12 months after end of plan year.* If excess aggregate contributions are not corrected within 12 months after the close of the plan year for which they were made, the plan will fail to meet the requirements of section 401(a)(4) for the plan year for which the excess aggregate contributions were made and all subsequent plan years in which the excess aggregate contributions remain in the plan.

(6) *Examples.* The principles of this paragraph (e) are illustrated by the following examples. Assume in each example that no income or loss is allocable to elective, employee, or matching contributions.

Example 1. (i) Employer A maintains a thrift plan that does not include a cash or deferred arrangement. In 1990, the actual contribution percentage (ACP) for nonhighly compensated employees is four percent. Thus, the ACP for the group of highly compensated employees may not exceed six percent. The three highly compensated employees who participate have the following compensation, contributions, and actual contribution ratios (ACRs):

Employee	Compensation	Employee and matching contributions	Actual contribution ratio (percent)
A	100,000	10,000	10
B	90,000	6,300	7
C	75,000	3,750	5
Average			7.33

(ii) The maximum amount of employee and matching contributions permitted on behalf of A, B, and C is determined by reducing contributions in order of their ACRs, beginning with the highest ACR. Thus, A's contribution is first reduced to $7,000 or 7.0 percent. Since the resulting ACP of 6.33 percent still exceeds the permitted highly compensated ACP of six percent, the contributions allocated to A and B must be further reduced to 6.5 percent. This results in an ACP of six percent, which meets the 200 percent/two percentage point test. The excess aggregate contributions for A and B are $3,500 and $450, respectively.

Example 2. Employee A is the sole highly compensated. participant in a cash or deferred arrangement maintained by Employer X. The plan that includes the arrangement, Plan X, provides a fully vested matching contribution equal to 50 percent of elective and employee contributions. Plan X is a calendar year plan. Plan X corrects excess contributions by recharacterization. For the 1988 plan year, A's compensation is $58,333, and A's elective contributions are $7,000. The actual deferral percentages and actual contribution percentages of A and other employees under Plan X are shown below:

	Actual deferral percentage	Actual contribution percentage
Employee A	12	6
Nonhighly compensated	8	4

(ii) In February 1989, Employer X determines that A's actual deferral ratio must be reduced to 10 percent, or $5,833, which requires a recharacterization of $1,167 as an employee contribution. This increases A's actual contribution ratio to eight percent ($3,500 in matching contributions plus $1,167 in employee contributions, divided by $58,333 in compensation). Since A's actual contribution ratio must be limited to six percent for Plan X to satisfy the actual contribution percentage test, Plan X must distribute $1,167 of A's employee and matching contributions.

Example 3. Same as *Example 2,* except that in 1988 A also had elective contributions of $1,313 under Plan Y, maintained by an employer unrelated to X. In January 1989, A requests and receives a distribution of $1,000 in excess deferrals from Plan X. A forfeits the $500 match on the excess deferrals. The $1,167 that would otherwise have been recharacterized for Plan X to satisfy the actual deferral percentage test is reduced by the $1,000 already distributed as an excess deferral, leaving $167 to be recharacterized. A's actual contribution ratio is now 5.43 percent ($3,000 in matching contributions plus $167 in employee contributions, divided by $58,333 in compensation). Since Plan X satisfies the actual contribution percentage test, no further distribution is required or permitted.

Example 4. Same as *Example 3,* except that A does not request a distribution of excess deferrals until March 1989. Employer X has already recharacterized $1,167 as employee contributions, and distributed it as an excess aggregate contribution (see *Example 1*). Because the amount distributed is greater than the excess deferrals, A is not entitled to a distribution of excess deferrals.

Example 5. For the 1987 plan year, Employee B defers $7,000 under Plan C and $1,000 under plan D. Plans C and D are maintained by unrelated employers; both Plans C and D have calendar plan years. Plan C provides a fully vested, 100 percent matching contribution and does not take elective contributions into account under section 401(m) or take matching contributions into account under section 401(k). B timely requests and receives a distribution of the $1,000 excess deferral from Plan C, and forfeits the corresponding matching contribution. Employer C subsequently determines that B has excess contributions of $600 and excess aggregate contributions of $600. Plan C provides that excess amounts are corrected by distribution. No distribution is required or permitted to correct the excess contributions because $1,000 has been distributed from this plan as excess deferrals. The distribution required to correct the excess aggregate contributions is $600. If B had corrected the excess deferrals of $1,000 by withdrawing $1,000 from Plan D, Plan C would have had to correct the $600 excess contributions in Plan C by distributing $600. Since B would have forfeited $600 (instead of $1,000) in matching contributions, B would have had $1,200 of excess aggregate contributions in Plan C. These would have been corrected by distributing an additional $1,200 from Plan C.

Example 6. Employee B is the sole highly compensated employee in a thrift plan under which the employer matches 100 percent of employee contributions up to two percent of compensation, and 50 percent of employee contributions up to the next four percent of compensation. For the 1988 plan year, B has compensation of $100,000. B makes an employee contribution of $7,000, or seven percent, and receives a four percent matching contribution of $4,000. Thus, B's actual contribution ratio (ACR) is 11 percent. The actual contribution percentage for the nonhighly compensated employees is five percent, and the employer determines that B's ACR must be reduced to seven percent to comply with the rules of section 401(m). In this case, the plan satisfies the requirements of this paragraph if it distributes the unmatched employee contributions of $1,000, and $2,000 of matched employee contributions with their related matches of $1,000. This would leave B with four percent employee contributions, and three percent matching contributions, for an ACR of seven percent. The plan could instead distribute all matching contributions. The plan would fail to meet the requirements of this paragraph if it distributed $4,000 (four percent) of B's employee contributions and none of B's matching contributions. See §§ 1.401(m)-1(e)(2) and 1.401(m)-1(e)(4).

Example 7. (i) Employee C is a highly compensated employee in Employer X's thrift plan, which matches 100 percent of employee contributions up to five percent of compensation. The matching contribution is vested at the rate of 20 percent per year. In 1991, C makes $5,000 in employee contributions and receives $5,000 of matching contributions. C is 60 percent vested in the matching contributions at the end of the 1991 plan year.

(ii) In February 1992, X determines that C has excess aggregate contributions of $1,000. The plan provides that only matching contributions will be distributed as excess aggregate contributions.

(iii) X has two options available in distributing C's excess contributions. The first option is to distribute $600 of vested matching contributions and forfeit $400 of nonvested matching contributions. These amounts are in proportion to C's vested and nonvested interests in all matching contributions. The second option is to distribute $1,000 of vested matching contributions, leaving the nonvested matching contributions in the plan.

(iv) If the second option is chosen, the plan must also provide a separate vesting schedule for vesting these nonvested matching contributions. This is necessary because the nonvested matching contributions must vest as rapidly as they would have had no distribution been made. Thus, 50 percent must vest in each of the next two years.

(v) The plan will not satisfy the nondiscriminatory availability requirement of section 401(a)(4) if only nonvested matching contributions are distributed because the effect is that matching contributions for highly compensated employees vest more rapidly than those for nonhighly compensated employees. See § 1.401(m)-1(e)(4).

(f) *Definitions.* The following definitions apply for purposes of this section and § 1.401(m)–2 except as otherwise specifically provided:

(1) *Actual contribution percentage*—(i) *General rule.* The actual contribution percentage for a group of employees for a plan year is the average of the actual contribution ratios of the employees in the group. For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, actual contribution ratios and the actual contribution percentage for a group are calculated to the nearest one-hundredth of a percentage point.

(ii) *Actual contribution ratio*—(A) *General rule.* An employee's actual contribution ratio is the sum of the employee and matching contributions allocated to the employee's account for the plan year, and the qualified nonelective and elective contributions treated as matching contributions for the plan year, divided by the employee's compensation for the plan year. If an eligible employee makes no employee contributions and no matching, qualified nonelective contributions, or elective contributions are taken into account with respect to the employee, the actual contribution ratio of the employee is zero. See paragraphs (b)(4), (b)(5), and (f)(2) of the section for rules regarding the employee and matching contributions, qualified nonelective and elective contributions, and compensation that are taken into account in calculating this fraction.

(B) *Highly compensated employee eligible under more than one plan.* The actual contribution ratio of a highly compensated employee who is eligible to participate in more than one plan of an employer to which employee or matching contributions are made is calculated by treating all the plans in which the employee is eligible to participate as one plan. However, plans that are not permitted to be aggregated under § 1.401(m)–1(b)(3)(ii) are not aggregated for this purpose. For example, if a highly compensated employee with compensation of $80,000 may receive matching contributions under two plans, the employee's actual contribution ratio under each plan is calculated by dividing the employee's total matching contributions under both plans by $80,000, unless the plans are required to be disaggregated. In that case, the actual contribution ratio of the employee under each plan is to be calculated by dividing the employee's matching contributions under that plan by $80,000. See paragraph (b)(3) of this section for the treatment of certain multiple plans. For plan years beginning after December 31, 1988, or such later date provided in paragraph (g) of this section, if a highly compensated employee participates in two or more plans that have different plan years, this paragraph (f)(1)(ii) is applied by treating all plans whose plan years end with or within the same calendar year as a single plan.

(C) *Employees subject to family aggregation rules*—(*1*) *Aggregation of employee contributions and other amounts.* For plan years beginning after December 31, 1986, or such later date provided in paragraph (g) of this section, if a highly compensated employee is subject to the family aggregation rules of section 414(q)(6) because that employee is either a five-percent owner or one of the 10 most highly compensated employees, the combined actual contribution ratio for the family group (treated as one highly compensated employee) must be determined by combining the employee contributions, matching contributions, amounts treated as matching contributions, and compensation of all the eligible family members.

(*2*) *Effect on actual contribution percentage of nonhighly compensated employees.* The employee and matching contributions, amounts treated as matching contributions, and compensation of all family members are disregarded for purposes of determining the actual contribution percentage for the group of highly compensated employees, and the group of nonhighly compensated employees.

(*3*) *Multiple family groups.* If an employee is required to be aggregated as a member of more than one family group in a plan, all eligible employees who are members of those family groups that include that employee are aggregated as one family group.

(2) *Compensation.* The term "compensation" means compensation as defined in § 1.401(k)–1(g)(2).

(3) *Elective contributions.* The term "elective contribution" means elective contribution as defined in § 1.401(k)–1(g)(3).

(4) *Eligible employee*—(i) *General rule.* The term "eligible employee" means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for a plan year. For example, if an employee must perform ministerial or mechanical acts (e.g., formal application for participation or consent to payroll withholding) in order to be eligible to make an employee contribution for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs these acts. An employee who is unable to make an employee contribution or to receive an allocation of matching contributions because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (e.g., satisfy a minimum period of service requirement) in order to be eligible to make an employee contribution or to receive an allocation of matching contributions for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is an eligible employee for purposes of section 401(m) for a plan year even though the employee may not make an employee contribution or receive an allocation of matching contributions by reason of the suspension. Finally, an employee does not fail to be an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1) or 415(e).

(ii) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, upon commencing employment with the employer or upon the employee's first becoming eligible under any plan of the employer providing for employee or matching contributions, is given a one-time opportunity to elect, and the employee does in fact elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under the plan or any other plan maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer.

(5) *Employee.* The term "employee" means an employee as defined in § 1.401(k)–1(g)(5).

(6) *Employee contributions.* The term "employee contribution" means any mandatory or voluntary contribution to the plan that is treated at the time of contribution as an after-tax employee contribution (e.g., by reporting the contribution as taxable income subject to applicable withholding requirements) and is allocated to a separate account to which the attributable earnings and losses are allocated. See § 1.401(k)–1(a)(2)(ii). The term includes:

(i) Employee contributions to the defined contribution portion of a plan described in section 414(k);

(ii) Employee contributions to a qualified cost-of-living arrangement described in section 415(k)(2)(B);

(iii) Employee contributions applied to the purchase of whole life insurance protection or survivor benefit protection under a defined contribution plan;

(iv) Amounts attributable to excess contributions within the meaning of section 401(k)(8)(B) that are recharacterized as employee contributions; and

(v) Employee contributions to an annuity contract described in section 403(b).

The term does not include repayment of loans, repayment of distributions described in section 411(a)(7)(C), or employee contributions that are transferred to a plan from another plan. For purposes of this paragraph (f)(6), employee contributions described in paragraph (f)(6)(ii) of this section are deemed contributed to a defined contribution plan.

(7) *Employer.* The term "employer" means the employer as defined in § 1.401(k)–1(g)(6).

(8) *Excess aggregate contributions.* The term "excess aggregate contribution" means, with respect to any plan year, the excess of the aggregate amount of the employee and matching contributions (and any qualified nonelective contribution or elective deferral taken into account in computing the contribution percentage) actually made on behalf of highly compensated employees for the plan year, over the maximum amount of contributions permitted under the limitations of section 401(m)(2)(A). The amount of excess aggregate contributions for each highly compensated employee is determined by using the method described in paragraph (e)(2) of this section. For purposes of this paragraph, qualified matching contributions treated as elective contributions in accordance with § 1.401(k)–1(b)(5) are disregarded.

(9) *Excess contributions.* The term "excess contribution" means an excess contribution as defined in § 1.401(k)–1(g)(7)(i).

(10) *Excess deferrals.* The term "excess deferrals" means excess deferral as defined in § 1.402(g)–1(e)(1)(iii).

(11) *Highly compensated employee.* The term "highly compensated employee" means a highly compensated employee as defined in section 414(q).

(12) *Matching contributions*—(i) *In general.* The term "matching contribution" means:

(A) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an employee contribution to a plan maintained by the employer;

(B) Any employer contribution (including a contribution made at the employer's discretion) to a defined contribution plan on account of an elective contribution to a plan maintained by the employer; and

(C) Any forfeiture allocated on the basis of employee contributions, matching contributions, or elective contributions.

(ii) *Employer contributions made on account of employee or elective contributions.* For purposes of paragraphs (f)(12)(i) of this section, whether an employer contribution is made on account of an employee contribution or an elective contribution is determined on the basis of all relevant facts and circumstances, including the relationship between the employer contribution and employee actions outside the plan. Thus, for example, an employer contribution made to a defined contribution plan on account of contributions made by an employee under an employer-sponsored savings arrangement that are not held in a plan that is described in § 1.402(g)–1(b) is not a matching contribution. Notwithstanding the foregoing, for plan years beginning before January 1, 1992, an employer may elect to take into account as matching contributions, contributions made to a plan pursuant to an arrangement under which the employer makes contributions to the plan on account of either employee contributions to the plan or contributions made by an employee to an employer-sponsored savings arrangement that are not held in the plan, provided that the arrangement was in effect prior to August 8, 1988.

(iii) *Contributions used to meet the requirements of section 416.* For plan years beginning after December 31, 1988, a contribution or allocation that is used to meet the minimum contribution or benefit requirement of section 416 is not treated as made on account of an employee or elective contribution and therefore is not a matching contribution.

(13) *Nonelective contributions.* The term "nonelective contribution" means nonelective contributions as defined in § 1.401(k)–1(g)(10).

(14) *Plan.* The term "plan" means a plan as defined in § 1.401(k)–1(g)(11).

(15) *Qualified nonelective contributions.* The term "qualified nonelective contribution" means qualified nonelective contributions as defined in § 1.401(k)–1(g)(13)(ii).

(g) *Effective dates*—(1) *General rule.* Except as provided in paragraphs (g)(2), (g)(3), (g)(4), and (g)(5) of this section, or as specifically provided otherwise in this section, this section is effective for plan years beginning after December 31, 1986.

(2) *Collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, this section does not apply to years beginning before the earlier of—

(i) January 1, 1989, or

(ii) The date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986).

(3) *Certain annuity contracts*—(i) In the case of an annuity contract under section 403(b), not maintained pursuant to a collective bargaining agreement, except as otherwise provided in paragraph (g)(5) of this section, this section applies to plan years beginning after December 31, 1988.

(ii) In the case of an annuity contract described in section 403(b) maintained pursuant to a collective bargaining agreement described in paragraph (g)(2)(i) of this section, this section does not apply to years beginning before the earlier of

(A) The later of—

(*1*) January 1, 1989, or

(*2*) The date determined under paragraph (g)(2)(ii) of this section; or

(B) January 1, 1991.

(4) *State and local government plans.* A governmental plan described in section 414(d) is treated as satisfying section 401(m) for plan years beginning before January 1, 1993.

(5) *Transition rule for plan years beginning before 1992*—(i) *General rule.* For plan years beginning before January 1, 1992, a reasonable interpretation of the rules set forth in section 401 (k) and (m) of the Internal Revenue Code (as in effect during those years) may be relied upon to determine whether a plan was qualified during those years.

(ii) *Restructuring*—(A) *General rule.* In determining whether the requirements of section 401(m) are satisfied for plan years beginning before January 1, 1992, a plan may be treated as consisting of two or more component plans, each consisting of all of the allocations and other benefits, rights, and features provided to a group of employees under the plan. An employee may not be included in more than one component plan of the same plan for a plan year under this method. If this method is used for a plan year, the requirements of section 401(m) are applied separately with respect to each component plan for

the plan year. Thus, for example, the actual contribution ratio and the amount of excess aggregate contributions, if any, of each eligible employee under each component plan must be determined as if the component plan were a separate plan. This method applies solely for purposes of section 401(m). Thus, for example, the requirements of section 410(b) must still be satisfied by the entire plan.

(B) *Identification of component plans*—(*1*) *Minimum coverage requirement.* The group of eligible employees described in § 1.401(m)–1(f)(4) under each component plan must separately satisfy the requirements of section 410(b) as if the component plan were a separate plan. Component plans may not be aggregated to satisfy this requirement.

(*2*) *Commonality requirement.* The group of employees used to identify a component plan must share some common attribute or attributes, other than similar actual contribution ratios. Permissible common attributes include, for example, employment at the same work site, in the same job category, for the same division or subsidiary, or for a unit acquired in a specific merger or acquisition, employment for the same number of years, compensation under the same method (e.g., salaried or hourly), coverage under the same contributions formula, and attributes that could be used as the basis of a classification that would be treated as reasonable under the average benefit percentage test of section 410(b)(1)(C) and (b)(2). Employees whose only common attribute is the same or similar actual contribution ratios, or another attribute having substantially the same effect as the same or similar actual contribution ratios, are not considered as sharing a common attribute for this purpose. This rule applies regardless of whether the component plan or the plan of which it is a part satisfies the ratio or percentage test of section 410(b).

§ 1.401(m)–2 Multiple use of alternative limitation.

(a) *In general.* The rules in this section prevent the multiple use of the alternative methods of compliance with sections 401 (k) and (m) contained in section 401(k)(3)(A)(ii)(II) and 401(m)(2)(A)(ii) respectively. Paragraph (b) of this section discusses the scope of this section and contains the general rule for determination of a multiple use of the alternative limitation. Paragraph (c) of this section contains rules for the correction of multiple use.

(b) *General rule for determination of multiple use*—(1) *In general.* Multiple use of the alternative limitation occurs if all of the conditions of this paragraph (b)(1) are satisfied:

(i) One or more highly compensated employees of the employer are eligible employees in both a cash or deferred arrangement subject to section 401(k) and a plan maintained by the employer subject to section 401(m).

(ii) The sum of the actual deferral percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(k) and the actual contribution percentage of the entire group of eligible highly compensated employees under the plan subject to section 401(m) exceeds the aggregate limit of paragraph (b)(3) of this section.

(iii) The actual deferral percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(k) exceeds the amount described in section 401(k)(3)(A)(ii)(1).

(iv) The actual contribution percentage of the entire group of eligible highly compensated employees under the arrangement subject to section 401(m) exceeds the amount described in section 401(m)(2)(A)(i).

The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees are determined after use of qualified nonelective contributions and qualified matching contributions to meet the requirements of section 401(k)(3)(A)(ii) and after use of qualified nonelective contributions and elective contributions to meet the requirements of section 401(m)(2)(A). The actual deferral percentage and actual contribution percentage of the group of eligible highly compensated employees are determined after any corrective distribution or forfeiture of excess deferrals, excess contributions, or excess aggregate contributions and after any recharacterization of excess contributions required without regard to this section. Only plans and arrangements maintained by the same employer are taken into account under this paragraph (b)(1). If the employer maintains two or more cash or deferred arrangements subject to section 401(k) that are not aggregated pursuant to § 1.401(k)–1(g)(11)(iii) (relating to mandatory disaggregation) multiple use is tested separately with respect to each plan. Thus, for example, if an employer maintains a cash or deferred arrangement with matching contributions, under which elective contributions may be made under either an ESOP or a non-ESOP, multiple use is tested separately with respect to elective contributions and matching contributions under the ESOP, and with respect to elective contributions and matching contributions under the non-ESOP.

(2) *Alternative limitation.* For purposes of this section, the term "alternative limitation" means the 200 percent or 2 percentage point limits in sections 401(k)(3)(A)(ii)(ii) and 401(m)(2)(A)(ii).

(3) *Aggregate limit*—(i) *In general.* For purposes of this section, the aggregate limit is the greater of:

(A) The sum of—

(*1*) 1.25 times the greater of the relevant actual deferral percentage or the relevant actual contribution percentage, and

(*2*) Two percentage points plus the lesser of the relevant actual deferral percentage or the relevant actual contribution percentage. In no event, however, may this amount exceed twice the lesser of the relevant actual deferral percentage or the relevant actual contribution percentage; or

(B) The sum of—

(*1*) 1.25 times the lesser of the relevant actual deferral percentage or the relevant actual contribution percentage, and

(*2*) Two percentage points plus the greater of the relevant actual deferral percentage or the relevant actual contribution percentage. In no event, however, may this amount exceed twice the greater of the relevant actual deferral percentage or the relevant actual contribution percentage.

(ii) *Relevant actual deferral percentage and relevant actual contribution percentage defined.* For purposes of paragraph (b)(3)(i) of this section, the term "relevant actual deferral percentage" means the actual deferral percentage of the group of nonhighly compensated employees eligible under the arrangement subject to section 401(k) for the plan year, and the term "relevant actual contribution percentage" means the actual contribution percentage of the group of nonhighly compensated employees eligible under the plan subject to section 401(m) for the plan year beginning with or within the plan year of the arrangement subject to section 401(k).

(iii) *Examples.* The provisions of this paragraph (b) are illustrated by the following examples:

Example 1. (i) Assume that Employer G maintains a plan that contains a cash or deferred arrangement under which the actual deferral percentages of highly compensated and nonhighly compensated employees are 5.5 and four percent respectively. The plan also permits employee contributions, and the actual contribution percentages for the two

groups are 4.2 and three percent respectively. The multiple use of the alternative limitation is tested as follows:

(1) Greater of the relevant actual deferral percentage or the relevant actual contribution percentage	4.00
(2) 1.25 times (1)	5.00
(3) Lesser of the relevant actual deferral percentage or the relevant actual contribution percentage	3.00
(4) (3) plus two percentage points	5.00
(5) (2)+(4)	10.00
(6) 1.25 times (3)	3.75
(7) (1) plus two percentage points	6.00
(8) (6)+(7)	9.75
(9) Aggregate limit greater of (5) or (8)	10.00

(ii) In this case, the sum of the actual deferral percentage and the actual contribution percentage of highly compensated employees is 9.70 percent, which is less than the aggregate limit. Therefore, there is no multiple use of the alternative limitation.

Example 2. Employer F maintains a plan subject to section 401(k) with a plan year beginning January 1, and a plan subject to section 401(m) with a plan year beginning July 1. The plan subject to section 401(k) does not correct excess contributions by recharacterization. The first actual deferral percentage taken into account is that for the plan year beginning January 1, 1989. The first actual contribution percentage taken into account is that for the plan year beginning July 1, 1989.

Example 3. (i) Employer E maintains a plan that contains a cash or deferred arrangement and provides for matching contributions. The actual deferral and contribution percentages for a plan year are as follows:

	Actual deferral percentage	Actual contribution percentage
Highly compensated	3.6	1.69
Nonhighly compensated	1.8	1.35

(ii) The actual deferral percentage of the highly compensated employees exceeds the normal limit (1.25 times 1.8, or 2.25%) but not the alternative limit (two plus 1.8, but not more than twice 1.8, or 3.6%). The actual contribution percentage of the highly compensated employees does not exceed the normal limit (1.25 times 1.35, or 1.69%). Accordingly, the plan satisfies both the actual deferral and contribution percentage tests. Since the actual contribution percentage of the highly compensated employees does not exceed the normal limit, condition (iv) of paragraph (b)(1) of this section is not satisfied. Therefore, there is no multiple use of the alternative limitation.

(c) *Correction of multiple use*—(1) *In general.* If multiple use of the alternative limitation occurs with respect to two or more plans or arrangements maintained by an employer, it must be corrected by reducing the actual deferral percentage or actual contribution percentage of highly compensated employees in the manner described in paragraph (c)(3) of this section. Instead of making this reduction, the employer may eliminate the multiple use of the alternative limitation by making qualified nonelective contributions in accordance with § 1.401(m)–1(b)(5)(F)(1) or § 1.401(k)–1(b)(5) and (e)(1).

(2) *Treatment of required reduction.* The required reduction is treated as an excess contribution under the arrangement subject to section 401(k) or excess aggregate contribution under the plan subject to section 401(m). However, if an excess contribution arising under this section is recharacterized as an employee contribution, the recharacterized amount is treated as an excess aggregate contribution.

(3) *Required reduction.* The amount of the reduction of the actual deferral percentage of the entire group of highly compensated employees eligible in the arrangement subject to section 401(k) is calculated in the manner described in § 1.401(k)–1(f)(2) or the amount of the reduction of the actual contribution percentage of the entire group of highly compensated employees eligible in the plan subject to section 401(m) is calculated in the manner described in § 1.401(m)–1(e)(2), as designated in the plan, so that there is no multiple use of the alternative limitation. The employer may elect to reduce the actual deferral ratios or the actual contribution ratios, as designated in the plan, either for all highly compensated employees under the plan or arrangements subject to reduction or for only those highly compensated employees who are eligible in both the arrangement subject to section 401(k) and the plan subject to section 401(m).

(4) *Examples.* The principles of this paragraph (c) are illustrated by the following examples. In all cases, the employer maintains both an arrangement subject to section 401(k) and a plan subject to section 401(m). Assume that there is no income or loss allocable to the elective, employee, or matching contributions.

Example 1. (i) All employees of Employer Q are eligible in both an arrangement subject to section 401(k) and a plan subject to section 401(m). Both plans have a calendar plan year. The plans provide that multiple use of the alternative limitation will be corrected in the plan subject to section 401(m) and that any required reduction in actual oontribution ratios will apply only to employees eligible to participate in both arrangements. Employees X and Y are highly compensated. Each received compensation of $100,000, deferred $6,000, received a $3,000 matching contribution, and made employee contributions of $3,000. Actual deferral and contribution percentages under the arrangement and plan for the 1989 plan year are shown below. No excess deferrals, excess contributions, or excess aggregate contributions have yet been required to be distributed, forfeited, or recharacterized under the plan.

	Actual deferral percentage	Actual contribution percentage
Highly compensated	6	6
Nonhighly compensated	4	4

(ii) The aggregate limit and amount required, to be corrected are determined as follows:

Step 1: Determination of Aggregate Limit

(1) Greater of relevant actual deferral percentage or relevant actual contribution percentage	4.0
(2) 1.25 times (1)	5.0
(3) Lesser of relevant actual deferral percentage or relevant actual contribution percentage	4.0
(4) (3) plus two percentage points	6.0
(5) (2)+(4)	11.0
(6) 1.25 times (3)	5.0
(7) (1) plus two percentage points	6.0
(8) (6)+(7)	11.0
(9) Aggregate limit Greater of (5) or (8)	11.0

Step 2: Calculation of Correction Amount

(10) Actual deferral percentage of highly compensated	6.0
(11) Maximum permitted actual contribution percentage of highly compensated ((9)–(10))	5.0
(12) Amount taken into account in determining actual contribution percentage of highly compensated Employee X	$6,000
(13) Maximum amount permitted without use of alternative limitation ((11)×compensation of Employee X)	$5,000
(14) Excess aggregate contribution ((12)–(13))	$1,000

(iii) A similar correction must be made for Employee Y.

Example 2. Same as *Example 1,* but the plan corrects the multiple use in the arrangement subject to section 401(k) and provides that excess contributions are recharacterized. In this case, the aggregate limit for the plans will be 11 percent. Similarly, the excess contributions for Employees X and Y, determined in a manner analogous to that used in *Example 1,* will be $1,000. When this is recharacterized, the actual contribution percentage for these employees will increase to seven percent, resulting in an excess aggregate contribution of $1,000 that must be distributed.

Example 3. Same as *Example 1,* except that Employee Y is not eligible to participate in the arrangement subject to section 401(k). No reduction of Y's actual contribution ratio is required because Y is only in the plan subject to section 401(m). In order to reduce the actual contribution percentage of the entire group of highly compensated employees

eligible for the plan subject to section 401(m) to five percent, the plan must reduce X's actual contribution percentage to four percent. X's employee and matching contributions are limited to $4,000. Therefore X has an excess aggregate contribution of $2,000.

(d) *Effective date*—(1) *General rule.* This section is effective for plan years beginning after December 31, 1988, or such later date provided in § 1.402(m)-1(g).

(2) *Transition rule.* For plan years beginning before January 1, 1992, a reasonable interpretation of the rules set forth in sections 401 (k) and (m) of the Internal Revenue Code (as in effect during those years) may be relied upon to determine whether a plan was qualified during those years. For plan years beginning before January 1, 1992, a plan may be restructured only in accordance with § 1.401(k)–1(h)(3)(iii) or § 1.401(m)–1(g)(5)(ii).

Par. 5. Section 1.402(a)–1 is amended by revising paragraph (d) to read as follows:

§ 1.402(a)-1 Taxability of beneficiary under a trust which meets the requirements of section 401(a).

* * * * *

(d) *Salary reduction, cash or deferred arrangements*—(1) *Inclusion in income.* Whether a contribution to an exempt trust or plan described in section 401(a) or 403(a) is made by the employer or the employee is determined on the basis of the particular facts and circumstances of each case. Nevertheless, an amount contributed to a plan or trust will, except as otherwise provided under paragraph (d)(2) of this section, be treated as contributed by the employee if it was contributed at the employee's election, even though the election was made before the year in which the amount was earned by the employee or before the year in which the amount became currently available to the employee. Any amount treated as contributed by the employee is includible in the gross income of the employee for the year in which the amount would have been received by the employee but for the election. Thus, for example, amounts contributed to an exempt trust or plan by reason of a salary reduction agreement under a cash or deferred arrangement are treated as received by the employee when they would have been received by the employee but for the election to defer. Accordingly, they are includible in the gross income of the employee for that year (except as provided under paragraph (d)(2) of this section). See § 1.401(k)–1(a)(3)(iii) and (2)(i) for the meaning of currently available and cash or deferred arrangement, respectively.

(2) *Amounts not included in income*—(i) *Qualified cash or deferred arrangement.* Elective contributions as defined in § 1.401(k)–l (g)(3) for a plan year made by an employer on behalf of an employee pursuant to a cash or deferred election under a qualified cash or deferred arrangement, as defined in § 1.401(k)–1(a)(4)(i), are not treated as received by or distributed to the employee or as employee contributions. For plan years beginning after December 31, 1992, whether a cash or deferred election is made under a qualified cash or deferred arrangement is determined without regard to the special rules for certain collectively bargained plans contained in § 1.401(k)–1(a)(7). As a result, elective contributions under these plans are treated as employee contributions for purposes of this section if the cash or deferred arrangement does not satisfy the actual deferral percentage test of section 401(k)(3) or otherwise fails to be a qualified cash or deferred arrangement.

(ii) *Matching contributions.* Matching contributions described in § 1.401(m)-1(f)(12) and section 401(m)(4) are not treated as contributed by an employee merely because they are made by the employer as a result of an employee's election.

(iii) *Effect of certain one-time elections.* Amounts contributed to an exempt plan or trust described in section 401(a) or 403(a) pursuant to the one-time irrevocable employee election to participate in a plan described in § 1.401(k)–1(a)(3)(iv) are not treated as contributed by an employee. Similarly, amounts contributed to an exempt plan or trust described in section 401(a) or 403(a) in which self-employed individuals may participate pursuant to the one-time irrevocable election described in § 1.401(k)–1(a)(6)(ii)(C) are not treated as contributed by an employee.

(3) *Effective date and transition rules*—(i) *Effective date.* In the case of a plan or trust that does not include a salary reduction or cash or deferred arrangement in existence on June 27, 1974, this paragraph applies to taxable years ending after that date.

(ii) *Transition rule for cash or deferred arrangements in existence on June 27, 1974*—(A) *General rule.* In the case of a plan or trust that includes a salary reduction or a cash or deferred arrangement in existence on June 27, 1974, this paragraph applies to plan years beginning after December 31, 1979 (or, in the case of a pre-ERISA money purchase plan, as defined in § 1.401(k)-1(g)(12), plan years beginning after July 18, 1984). For plan years beginning prior to January 1, 1980 (or, in the case of a pre-ERISA money purchase plan, plan years beginning before July 19, 1984), the taxable year of inclusion in gross income of the employee of any amount so contributed by the employer to the trust is determined in a manner consistent with Rev. Rul. 56–497, 1956–2 CB 284, Rev. Rul. 63–180, 1963–2 CB 189, and Rev. Rul. 68–89, 1968–1 CB 402.

(B) *Meaning of cash or deferred arrangement in existence on June 27, 1974.* A cash or deferred arrangement is considered as in existence on June 27, 1974, if, on or before that date, it was reduced to writing and adopted by the employer (including, in the case of a corporate employer, formal approval by the employer's board of directors and, if required, shareholders), even though no amounts had been contributed pursuant to the terms of the arrangement as of that date.

(iii) *Reasonable interpretation for plan years beginning after 1979 and before 1992.* For plan years beginning after December 31, 1979 (or in the case of a pre-ERISA money purchase plan, plan years beginning after July 18, 1984) and before January 1, 1992, a reasonable interpretation of the rules set forth in section 401(k) (as in effect during those years) may be relied upon to determine whether contributions were made under a qualified cash or deferred arrangement.

(iv) *Special rule for governmental and collectively bargained plans.* For plan years beginning before January 1, 1993, a nonqualified cash or deferred arrangement will be treated as a qualified cash or deferred arrangement solely for purposes of paragraph (d)(2)(i) of this section if it is part of either a plan adopted by a state or local government before May 6, 1986, or a plan (or portion of a plan) that automatically satisfies section 401(a)(4) under § 1.401(k)–l(a)(7), relating to certain collectively bargained plans.

Par. 6. New §§ 1.402(g)–0 and 1.402(g)–1 are added to read as follows:

§ 1.402(g)–0 Limitation on exclusion for elective deferrals, table of contents.

This section contains the captions that appear in § 1.402(g)–1.

§ 1.402(g)–1 Limitation on exclusion for elective deferrals.

(a) *In general.* The excess of an individual's elective deferrals for any taxable year over the applicable limit for the year may not be excluded from gross income under sections 402(a)(8), 402(h)(1)(B), 403(b), 408(k)(6), or 501(c)(18). Thus, an individual's elective deferrals in excess of the applicable limit for a taxable year (i.e., the individual's excess deferrals for the year) must be included in gross income for the year.

(b) *Elective deferrals.* An individual's elective deferrals for a taxable year are the sum of the following:

(1) Any elective contribution under a qualified cash or deferred arrangement (as defined in section 401(k)) to the extent not includible in the individual's gross income for the taxable year on account of section 402(a)(8) (before applying the limits of section 402(g) or this section).

(2) Any employer contribution to a simplified employee pension (as defined in section 408(k)) to the extent not includible in the individual's gross income for the taxable year on account of section 402(h)(1)(B) (before applying the limits of section 402(g) or this section).

(3) Any employer contribution to an annuity contract under section 403(b) under a salary reduction agreement (within the meaning of section 3121(a)(5)(D)) to the extent not includible in the individual's gross income for the taxable year on account of section 403(b) (before applying the limits of section 402(g) or this section).

(4) Any employee contribution designated as deductible under a trust described in section 501(c)(18) to the extent deductible from the individual's income for the taxable year on account of section 501(c)(18) (before appying the limits of section 402(g) or this section). For purposes of this section, the employee contribution is treated as though it were excluded from the individual's gross income.

(c) *Certain one-time irrevocable elections.* An employer contribution is not treated as an elective deferral under paragraph (b) of this section if the contribution is made pursuant to a one-time irrevocable election made by the employee:

(1) In the case of an annuity contract under section 403(b), at the time of initial eligibility to participate in the salary reduction agreement;

(2) In the case of a qualified cash or deferred arrangement, at a time when, under § 1.401(k)–1(a)(3)(iv), the election is not treated as a cash or deferred election;

(3) In the case of a trust described in section 501(c)(18), at the time of initial eligibility to have the employer contribute on the employee's behalf to the trust.

(d) *Applicable limit*—(1) *In general.* Except as adjusted under paragraphs (d)(2) and (d)(3) of this section, the applicable limit for an individual's taxable year beginning in the 1987 calendar year is $7,000. This amount is increased for the taxable year beginning in 1988 and subsequent calendar years in the same manner as the $90,000 amount is adjusted under section 415(d).

(2) *Special adjustment for elective deferrals with respect to a section 403(b) annuity contract.* The applicable limit for an individual who makes elective deferrals described in paragraph (b)(3) of this section for a taxable year is adjusted by increasing the applicable limit otherwise determined under paragraph (d)(1) of this section by the amount of the individual's elective deferrals described in paragraph (b)(3) of this section for the taxable year. This adjustment cannot cause the applicable limit for any taxable year to exceed $9,500.

(3) *Special adjustment for elective deferrals with respect to a section 403(b) annuity contract for certain long-term employees.* The applicable limit for an individual who is a qualified employee (as defined in section 402(g)(8)(C)) and has elective deferrals described in paragraph (b)(3) of this section for a taxable year is adjusted by increasing the applicable limit otherwise determined under paragraphs (d)(1) and (d)(2) of this section in accordance with section 402(g)(8)(A).

(4) *Example.* The provisions of this paragraph (d) are illustrated by the following example.

Example. Employer X maintains a cash or deferred arrangement under section 401(k), and offers its employees section 403(b) contracts to which elective deferrals may be made. For the 1987 taxable year, three of X's employees, A, B, and C, contribute $3,500, $1,000, and $8,500, respectively, as elective deferrals under the section 403(b) contract. The maximum amounts that A, B, and C may contribute to the cash or deferred arrangement are $6,000, $7,000, and $1,000, respectively. B may only contribute $7,000 under the cash or deferred arrangement because the special adjustment under paragraph (d)(2) of this section applies only to section 403(b) annuity contracts. B could, of course, contribute up to $2,500 under the section 403(b) contract (to the extent otherwise permitted), in addition to the $7,000 under the cash or deferred arrangement.

(e) *Treatment of excess deferrals*—(1) *Plan qualification*—(i) *Effect of excess deferrals.* For plan years beginning before January 1, 1988, a plan, annuity contract, simplified employee pension, or trust does not fail to meet the requirements of section 401(a), section 403(b), section 408(k), or section 501(c)(18), respectively, merely because excess deferrals are made with respect to the plan, contract, pension, or trust. For plan years beginning after December 3l, 1987, see section 401(a)(30) and § 1.401(a)–30 for the effect of excess deferrals on the qualification of a plan or trust under section 401(a). For purposes of determining whether a plan or trust complies in operation with section 401(a)(30), excess deferrals that are distributed under paragraph (e)(2) or (3) of this section are disregarded. Similar rules apply to annuity contracts under section 403(b), simplified employee pensions under section 408(k), and plans or trusts under section 501(c)(28).

(ii) *Treatment of excess deferrals as employer contributions.* For other purposes of the Code, including sections 401(a)(4), 401(k)(3), 404, 409, 411, 412,

and 416, excess deferrals must be treated as employer contributions even if they are distributed in accordance with paragraph (e)(2) or (3) of this section. However, excess deferrals of a nonhighly compensated employee are not taken into account under section 401(k)(3) (the actual deferral percentage test) to the extent the excess deferrals are prohibited under section 401(a)(30). Excess deferrals are also treated as employer contributions for purposes of section 415 unless distributed under paragraph (e)(2) or (3) of this section.

(iii) *Definition of excess deferrals.* The term "excess deferrals" means the excess of an individual's elective deferrals for any taxable year, as defined in § 1.402(g)–1(b), over the applicable limit under section 402(g)(1) for the taxable year.

(2) *Correction of excess deferrals after the taxable year.* A plan may provide that if any amount is included in the gross income of an individual under paragraph (a) of this section for a taxable year:

(i) Not later than the first April 15 (or such earlier date specified in the plan) following the close of the individual's taxable year, the individual may notify each plan under which deferrals were made of the amount of the excess deferrals received by that plan. A plan may provide that an individual is deemed to have notified the plan of excess deferrals to the extent the individual has excess deferrals for the taxable year calculated by taking into account only elective deferrals under the plan and other plans of the same employer. A plan may instead provide that the employer may notify the plan on behalf of the individual under these circumstances.

(ii) Not later than the first April 15 following the close of the taxable year, the plan may distribute to the individual the amount designated under paragraph (e)(2)(i) of this section (and any income allocable to that amount).

(3) *Correction of excess deferrals during taxable year*—(i) A plan may provide that an individual who has excess deferrals for a taxable year may receive a corrective distribution of excess deferrals during the same year. This corrective distribution may be made only if all of the following conditions are satisfied:

(A) The individual designates the distribution as an excess deferral. A plan may provide that an individual is deemed to have designated the distribution to the extent the individual has excess deferrals for the taxable year calculated by taking into account only elective deferrals under the plan and other plans of the same employer. A plan may instead provide that the employer may make the designation on behalf of the individual under these circumstances.

(B) The correcting distribution is made after the date on which the plan received the excess deferral.

(C) The plan designates the distribution as a distribution of excess deferrals.

(ii) The provisions of this paragraph (e)(3) are illustrated by the following example:

Example. S is a 62 year old individual who participates in Employer Y's qualified cash or deferred arrangement. In January 1991, S withdraws $5,000 from Y's cash or deferred arrangement. From February through September, S defers $900 per month. On October 1, S leaves Employer Y and becomes employed by Employer Z (unrelated to Y). During the remainder of 1991, S defers $1,800 under Z's qualified cash or deferred arrangement. In January 1992, S realizes that S has deferred a total of $9,000 in 1991, and therefore has a $525 excess deferral ($9,000 minus $8,475, the applicable limit for 1991). An additional $525 must be distributed to S before April 15, 1992, to correct the excess deferral. The $5,000 withdrawal did not correct the excess deferral because it occurred before the excess deferral was made.

(4) *Plan provisions.* In order to distribute excess deferrals pursuant to paragraphs (e)(2) or (e)(3) of this section, a plan must contain language permitting distribution of excess deferrals. A plan may require the notification in paragraphs (e)(2) and (e)(3) of this section to be in writing and may require that the employee certify or otherwise establish that the designated amount is an excess deferral. A plan need not permit distribution of excess deferrals.

(5) *Income allocable to excess deferrals*—(i) *General rule.* The income allocable to excess deferrals is equal to the sum of the allocable gain or loss for the taxable year of the individual and, if the plan so provides, the allocable gain or loss for the period between the end of the taxable year and the date of distribution (the "gap period").

(ii) *Method of allocating income.* A plan may use any reasonable method for computing the income allocable to excess deferrals, provided that the method does not violate section 401(a)(4), is used consistently for all participants and for all corrective distributions under a plan for the plan year, and is used by the plan for allocating income to participants' accounts.

(iii) *Alternative method of allocating income.* A plan may allocate income to excess deferrals by multiplying the income for the taxable year (and the gap period, if the plan so provides) allocable to elective contributions by a fraction. The numerator of the fraction is the excess deferrals by the employee for the taxable year. The denominator of the fraction is equal to the sum of:

(A) The total account balance of the employee attributable to elective contributions as of the beginning of the taxable year, plus

(B) The employee's elective contributions for the taxable year (and the gap period, if the plan so provides).

(iv) *Safe harbor method of allocating gap period income.* Under the safe harbor method, income on excess deferrals for the gap period is equal to 10 percent of the income allocable to excess deferrals for the taxable year (calculated under the method described in paragraph (e)(5)(iii) of this section), multiplied by the number of calendar months that have elapsed since the end of the taxable year. For purposes of calculating the number of calendar months that have elapsed under the safe harbor method, a corrective distribution that is made on or before the fifteenth day of the month is treated as made on the last day of the preceding month. A distribution made after the fifteenth day of the month is treated as made on the first day of the next month.

(6) *Coordination with distribution or recharacterization of excess contributions.* The amount of excess deferrals that may be distributed under this paragraph (e) with respect to an employee for a taxable year is reduced by any excess contributions previously distributed or recharacterized with respect to the employee for the plan year beginning with or within the taxable year. In the event of a reduction under this paragraph (e)(6), the amount of excess contributions includible in the gross income of the employee and reported by the employer as a distribution of excess contributions is reduced by the amount of the reduction under this paragraph (e)(6). See § 1.401(k)–1(f)(5)(i). In no case may an individual receive from a plan as a corrective distribution for a taxable year under paragraph (e)(2) or (e)(3) of this section an amount in excess of the individual's total elective deferrals under the plan for the taxable year.

(7) *No employee or spousal consent required.* A corrective distribution of excess deferrals (and income) may be made under the terms of the plan without regard to any notice or consent otherwise required under sections 411(a)(11) or 417.

(8) *Tax treatment*—(i) *Corrective distributions on or before April 15 after close of taxable year.* A corrective distribution of excess deferrals within

the period described in paragraph (e)(2) or (e)(3) of this section is excludable from the employee's gross income. However, the income allocable to excess deferrals is includible in the employee's gross income for the taxable year in which the allocable income is distributed. The corrective distribution of excess deferrals (and income) is not subject to the early distribution tax of section 72(t) and is not treated as a distribution for purposes of applying the excise tax under section 4980A.

(ii) *Special rule for 1987 and 1988 excess deferrals.* Income on excess deferrals for 1987 or 1988 that were timely distributed on or before April 17, 1989, may be reported by the recipient either in the year described in paragraph (e)(8)(i) of this section, or in the year in which the employee would have received the elective deferrals had the employee originally elected to receive the amounts in cash.

(iii) *Distributions of excess deferrals after correction period.* If excess deferrals (and income) for a taxable year are not distributed within the period described in paragraphs (e)(2) and (e)(3) of this section, they may only be distributed when permitted under section 401(k)(2)(B). These amounts are includible in gross income when distributed, and are treated for purposes of the distribution rules otherwise applicable to the plan as elective deferrals (and income) that were excludable from the individual's gross income under section 402(g). Thus, any amount includible in gross income for any taxable year under this section that is not distributed by April 15 of the following taxable year is not treated as an investment in the contract for purposes of section 72 and is includible in the employee's gross income when distributed from the plan. Excess deferrals that are distributed under this paragraph (e)(8)(iii) are treated as employer contributions for purposes of section 415 when they are contributed to the plan.

(9) *No reduction of required minimum distribution.* A distribution of excess deferrals (and income) under paragraphs (e)(2) and (e)(3) of this section is not treated as a distribution for purposes of determining whether the plan meets the minimum distribution requirements of section 401(a)(9).

(10) *Partial correction.* Any distribution under paragraphs (e)(2) or (e)(3) of this section of less than the entire amount of excess deferrals (and income) is treated as a pro rata distribution of excess deferrals and income.

(11) *Examples.* The provisions of this paragraph are illustrated by the following examples. Assume in *Examples 1* and *2* that there is no income or loss allocable to the elective deferrals.

Example 1. Employee A is a 60-year old highly compensated employee who participates in Employer M's cash or deferred arrangement. During the period of January through September of 1988, A contributed $7,000 to the arrangement in elective deferrals. During the same period A also contributed $813 in elective deferrals under a plan of an unrelated employer. In December of 1988, A made a withdrawal of $1,000 from Employer M's plan but did not designate this as a withdrawal of an excess deferral. In January of 1989, A notifies Employer M of an excess deferral, specifying a distribution of $500 for 1988. To correct the excess deferrals, A must receive this additional $500 even though A has already withdrawn $1,000 for 1988. A may exclude from income in 1988 only $7,313. However, if the $500 is distributed by April 25, 1989, the distribution is excludable from A's gross income in 1989. Even if A withdraws the $500, M must take into account the entire $7,000 in computing A's actual deferral percentage for 1988.

Example 2. (i) Corporation X maintains a cash or deferred arrangement. The plan year is the calendar year. For plan year 1989, all 10 of X's employees are eligible to participate in the plan. The employees' compensation, contributions, and actual deferral ratios are shown in the following table:

Employee	Compensation	Contribution	Actual deferral ratio (percent)
A	$140,000	$7,000	5.0
B	70,000	7,000	10.0
C	70,000	7,000	10.0
D	45,000	2,250	5.0
E	40,000	4,000	10.0
F	35,000	1,750	5.0
G	35,000	350	1.0
H	30,000	3,000	10.0
I	17,500	0	0
J	17,500	0	0.0

(ii) Employees A, B, and C are highly compensated employees within the meaning of section 414(q). Employees D, E, F, G, H, I, and J are nonhighly compensated employees. The actual deferral percentages for the highly compensated employees and nonhighly compensated employees are 8.33 percent and 4.43 percent, respectively. These percentages do not satisfy the requirements of section 401(k)(3)(A)(ii). The actual deferral percentage for the highly compensated employees may not exceed 6.43 percent.

(iii) The plan reduces the actual deferral ratios of B and C to 7.14 percent by distributing $2,002 ($7,000 − .0714 × $70,000) to each in January 1990. Section 401(k)(3)(A)(ii) is therefore satisfied.

(iv) In February 1990, B notifies X that B made elective deferrals of $2,000 under a qualified cash or deferred arrangement maintained by an unrelated employer in 1989, and requests distribution of $2,000 from X's plan. However, since B has already received a distribution of $2,002 to meet the ADP test, no additional amounts may be distributed as excess deferrals by this plan. But X must report $2,000 as a distribution of an excess deferral and $2 as a distribution of an excess contribution.

(v) Excess deferrals distributed to B are taken into account in calculating B's actual deferral ratio. See paragraph (e)(1)(ii) of this section. Therefore B's actual deferral ratio must be recalculated as 10.00 percent ($6,998 divided by $70,000). The actual deferral percentages do not satisfy section 401(k)(3)(A)(ii). Further correction must be made.

Example 3. Employee T has excess deferrals of $1,000. The income attributable to excess deferrals is $100. T properly notifies the employer, and requests a distribution of the excess deferral (and income) on February 1. The plan distributes $1,000 to T by April 15. Because the plan did not distribute any additional amount as income, $909 is treated as a distribution of excess deferrals, and $91 is treated as a distribution of earnings. With respect to amounts remaining in the account, $91 is treated as an elective deferral and is not included in T's investment in the contract. Because it was not distributed by the required date, the $91 is includible in gross income upon distribution as well as in the year of deferral.

(f) *Community property laws.* This section is applied without regard to community property laws.

(g) *Effective date*—(1) *In general.* Except as otherwise provided, the provisions of this section are effective for taxable years beginning after December 31, 1986.

(2) *Deferrals under collective bargaining agreements.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the provisions of this section do not apply to contributions made pursuant to the collective bargaining agreement for taxable years beginning before the earlier of January 1, 1989, or the date on which the agreement terminates (determined without regard to any extension thereof after February 28, 1986). These contributions under a collective bargaining agreement are taken into account for purposes of applying this section to elective deferrals under plans not described in this paragraph (g)(2).

(3) *Transition rule.* For taxable years beginning before January 1, 1992, a plan or an individual may rely on a reasonable interpretation of the rules set forth in section 402(g), as in effect during those years.

(4) *Partnership cash or deferred arrangements.* For purposes of section 402(g), employer contributions for any plan year beginning after December 31, 1986, and before January 1, 1989, under an arrangement that directly or indirectly permits individual partners to vary the amount of contributions made on their behalf will be treated as elective contributions only if the arrangement was intended to satisfy and did satisfy the nondiscrimination test of section 401(k)(3) and § 1.401(k)-1(b) for the plan year.

Par. 7. Section 1.411(a)-4 is amended by adding a new paragraph (b)(7) to read as follows:

§ 1.411(a)-4 Forfeitures, suspensions, etc.

* * * * *

(b) * * *

(7) *Certain matching contributions.* A matching contribution (within the meaning of section 401(m)(4)(A) and § 1.401(m)-1(f)(12)) is not treated as forfeitable even if under the plan it may be forfeited under § 1.401(m)-1(e)(1) because the contribution to which it relates is treated as an excess contribution (within the meaning of § 1.402(k)-1(f)(2) and (g)(7)), excess deferral (within the meaning of § 1.402(g)-1(e)(1)(iii)), or excess aggregate contribution (within the meaning of § 1.401(m)-1(f)(8)).

* * * * *

Par. 8. In § 1.411(d)-4, A-2 is amended by adding new paragraphs (b)(2)(x) and (b)(2)(xi) to read as follows:

§ 1.411(d)-4 Section 411(d)(6) protected benefits.

* * * * *

A-2: * * *

(b) * * *

(2) * * *

(x) *Amendment of hardship distribution standards.* A qualified cash or deferred arrangement that permits hardship distributions under § 1.401(k)-1(d)(2) may be amended to specify or modify nondiscriminatory and objective standards for determining the existence of an immediate and heavy financial need, the amount necessary to meet the need, or other conditions relating to eligibility to receive a hardship distribution. For example, a plan will not be treated as violating section 411(d)(6) merely because it is amended to specify or modify the resources an employee must exhaust to qualify for a hardship distribution or to require employees to provide additional statements or representations to establish the existence of a hardship. A qualified cash or deferred arrangement may also be amended to eliminate hardship distributions.

(xi) *Section 415 benefit limitations.* Accrued benefits under a plan as of the first day of the first limitation year beginning after December 31, 1986, that exceed the benefit limitations under section 415(b) effective on the first day of the plan's first limitation year beginning after December 31, 1986, because of a change in the terms and conditions of the plan made after May 5, 1986, or the establishment of a plan after that date, may be reduced to the level permitted under section 415(b).

* * * * *

Par. 9. Section 1.415-6 is amended by revising paragraph (b)(1), the introductory text of paragraph (b)(6), and the first sentence of paragraph (b)(6)(iv) to read as follows:

§ 1.415-6 Limitation for defined contribution plans.

* * * * *

(b) *Annual additions*—(1) *In general*—(i) *Limitation years beginning after December 31, 1986.* For limitation years beginning after December 31, 1986, or such later date provided in paragraph (b)(1)(iii) of this section, the term "annual addition" means, for purposes of this section, the sum, credited to a participant's account for any limitation year, of:

(A) Employer contributions;

(B) Employee contributions; and

(C) Forfeitures.

Contributions do not fail to be annual additions merely because they are excess deferrals, excess contributions, or excess aggregate contributions or merely because excess contributions or excess aggregate contributions are corrected through distribution or recharacterization. Excess deferrals that are distributed in accordance with § 1.402(g)-1(e) (2) or (3) are not annual additions.

(ii) *Limitation years beginning before January 1, 1987.* For limitation years beginning before January 1, 1987, or such later date provided in paragraph (b)(1)(iii) of this section, the term "annual addition" means, for purposes of this section, the sum, credited to a participant's account for any limitation year, of:

(A) Employer contributions;

(B) The lesser of the amount of employee contributions in excess of 6 percent of compensation (as defined in paragraph (a)(3) of this section) for the limitation year, or one-half of the employee contributions for that year; and

(C) Forfeitures.

(iii) *Certain collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the date specified in this paragraph is the earlier of:

(A) The date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986); or

(B) December 31, 1988, in the case of paragraph (b)(1)(i) of this section, and January 1, 1989, in the case of paragraph (b)(1)(ii) of this section.

* * * * *

(6) *Excess annual additions.* If, as a result of the allocation of forfeitures, a reasonable error in estimating a participant's annual compensation, a reasonable error in determining the amount of elective deferrals (within the meaning of section 402(g)(3)) that may be made with respect to any individual under the limits of section 415, or under other limited facts and circumstances that the Commissioner finds justify the availability of the rules set forth in this paragraph (b)(6), the annual additions under the terms of a plan for a particular participant would cause the limitations of section 415 applicable to that participant for the limitation year to be exceeded, the excess amounts shall not be deemed annual additions in that limitation year if they are treated in

accordance with any one of the following:

* * * * *

(iv) Notwithstanding paragraphs (b)(6)(i), (ii), or (iii) of this section, the plan may provide for the distribution of elective deferrals (within the meaning of section 402(g)(3)) or the return of employee contributions (whether voluntary or mandatory), to the extent that the distribution or return would reduce the excess amounts in the participant's account. These amounts are disregarded for purposes of section 402(g), the actual deferral percentage test of section 401(k)(3), and the actual contribution percentage test of section 401(m)(2). * * *

* * * * *

Par. 10. Section 1.416–1 is amended by adding new questions and answers M–18, M–19, and M–20 to read as follows:

§ 1.416–1 Questions and answers on top-heavy plans.

* * * * *

M–18 Q. May qualified nonelective contributions described in section 401(m)(4)(C) be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416?

A. Yes. This is the case even if the qualified nonelective contributions are taken into account under the actual deferral percentage test of § 1.401(k)–1(b)(2) or under the actual contribution percentage test of § 1.401(m)–1(b).

M–19 Q. May matching contributions described in section 401(m)(4)(A) be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416?

A. Matching contributions allocated to key employees are treated as employer contributions for purposes of determining the minimum contribution or benefit under section 416. However, if a plan uses contributions allocated to employees other than key employees on the basis of employee contributions or elective contributions to satisfy the minimum contribution requirement, these contributions are not treated as matching contributions for purposes of applying the requirements of sections 401(k) and 401(m) for plan years beginning after December 31, 1988. Thus these contributions must meet the nondiscrimination requirements of section 401(a)(4) without regard to section 401(m). See § 1.401(m)–1(f)(12)(iii).

M–20 Q. May elective contributions be treated as employer contributions for purposes of satisfying the minimum contribution or benefit requirement of section 416(c)(2)?

A. Elective contributions on behalf of key employees are taken into account in determining the minimum required contribution under section 416(c)(2). However, elective contributions on behalf of employees other than key employees may not be treated as employer contributions for purposes of the minimum contribution or benefit requirement of section 416. See section 401(k)(4)(C) and the regulations thereunder. This Question and Answer is effective for plan years beginning after December 31, 1988.

PART 54—PENSION EXCISE TAXES

Par. 11. The authority citation for part 54 continues to read in part:

Authority: 26 U.S.C 7805 * * *.

Par. 12. New §§ 54.4979–0 and 54.4979–1 are added to read as follows:

§ 54.4979–0 Excise tax on certain excess contributions and excess aggregate contributions; table of contents.

This section contains the captions that appear in § 54.9479–1.

§ 54.4979–1 Excise tax on certain excess contributions and excess aggregate contributions.

§ 54.4979–1 Excise tax on certain excess contributions and excess aggregate contributions.

(a) *In general*—(1) *General rule.* In the case of any plan (as defined in paragraph (b)(3) of this section), there is imposed a tax for the employer's taxable year equal to 10 percent of the sum of:

(i) Any excess contributions under a plan for the plan year ending in the taxable year; and

(ii) Any excess aggregate contributions under the plan for the plan year ending in the taxable year.

(2) *Liability for tax.* The tax imposed by paragraph (a)(1) of this section is to be paid by the employer. In the case of a collectively bargained plan to which section 413(b) applies, all employers who are parties to the collective bargaining agreement and whose employees are participants in the plan are jointly and severally liable for the tax.

(3) *Due date and form for payment of tax*—(i) The tax described in paragraph (a)(1) of this section is due on the last day of the 15th month after the close of the plan year to which the excess contributions or excess aggregate contributions relate.

(ii) An employer that owes the tax described in paragraph (a)(1) of this section must file the form prescribed by the Commissioner for the payment of the tax.

(4) *Special rule for simplified employee pensions*—(i) An employer that maintains a simplified employee pension (SEP) as defined in section 408(k) that accepts elective contributions is exempted from the tax of section 4979 and paragraph (a)(1) of this section if it notifies its employees of the fact and tax consequences of excess contributions within 2½ months following the plan year for which excess contributions are made. The notification must meet the standards of paragraph (a)(4)(ii) of this section.

(ii) The employer's notification to each affected employee of the excess SEP contributions must specifically state, in a manner calculated to be understood by the average plan participant: the amount of the excess contributions attributable to that employee's elective deferrals; the calendar year for which the excess contributions were made; that the excess contributions are includible in the affected employee's gross income for the specified calendar year; and that failure to withdraw the excess contributions and income attributable thereto by the due date (plus extensions) for filing the affected employee's tax return for the preceding calendar year may result in significant penalties.

(iii) If an employer does not notify its employees by the last day of the 12-month period following the year of excess SEP contributions, the SEP will no longer be considered to meet the requirements of section 408(k)(6).

(b) *Definitions.* The following is a list of terms and definitions to be used for purposes of section 4979 and this section:

(1) *Excess aggregate contributions.* The term "excess aggregate contribution" has the meaning set forth in § 1.401(m)-1(f)(8) of this chapter. For purposes of determining excess aggregate contributions under an annuity contract described in section 403(b), the contract is treated as a plan described in section 401(a).

(2) *Excess contributions.* The term "excess contributions" has the meaning set forth in sections 401(k)(8)(B), 408(k)(6)(C)(ii), and 501(c)(18). See, e.g., § 1.401(k)-1(g)(7) of this chapter.

(3) *Plan.* The term "plan" means:

(i) A plan described in section 401(a) that includes a trust exempt from tax under section 501(a);

(ii) Any annuity plan described in section 403(a);

(iii) Any annuity contract described in section 403(b);

(iv) A simplified employee pension of an employer that satisfies the requirements of section 408(k); and

(v) A plan described in section 501(c)(18).

The term includes any plan that at any time has been determined by the Secretary to be one of the types of plans described in this paragraph (b)(3).

(c) *No tax when excess distributed within 2½ months of close of year or additional employer contributions made*—(1) *General rule.* No tax is imposed under this section on any excess contribution or excess aggregate contribution, as the case may be, to the extent the contribution (together with any income allocable thereto) is corrected before the close of the first 2½ months of the following plan year. Qualified nonelective contributions and qualified matching contributions taken into account under § 1.401(k)-1(b)(5) of this chapter or qualified nonelective contributions or elective contributions taken into account under § 1.401(m)-1(b)(5) of this chapter for a plan year may permit a plan to avoid excess contributions or excess aggregate contributions, respectively, even if made after the close of the 2½ month period. See § 1.401(k)-1(f)(1)(i) and (6)(i) of this chapter for methods to avoid excess contributions, and § 1.401(m)-1(e)(1)(i) of this chapter for methods to avoid excess aggregate contributions.

(2) *Tax treatment of distributions.* See § 1.401(k)-1(f)(3)(ii) and (4)(v) of this chapter for rules for determining the tax consequences to a participant of a distribution or recharacterization of excess contributions and income allocable thereto, including a special rule for de minimis distributions. See § 1.401(m)-1(e)(3)(v) of this chapter for rules for determining the tax consequences to a participant of a distribution of excess aggregate contributions and income allocable thereto.

(3) *Income.* See § 1.401(k)-1(f)(4)(ii) of this chapter for rules for determining income allocable to excess contributions. See § 1.401(m)-1(e)(3)(ii) of this chapter for rules for determining income allocable to excess aggregate contributions.

(4) *Example.* The provisions of this paragraph (c) are illustrated by the following example.

Example. (i) Employer X maintains Plan Y, a calendar year profit-sharing plan that includes a qualified cash or deferred arrangement. Under the plan, failure to satisfy the actual deferral percentage test may only be corrected by distributing the excess contributions or making qualified nonelective contributions (QNECs).

(ii) On December 31, 1990, X determines that Y does not satisfy the actual deferral percentage test for the 1990 plan year, and that excess contributions for the year equal $5,000. On March 1, 1991, Y distributes $2,000 of these excess contributions. On May 30, 1991, X distributes another $2,000 of excess contributions. On December 17, 1991, X contributes QNECs for certain nonhighly compensated employees, thereby eliminating the remainder of the excess contributions for 1990.

(iii) X has incurred a tax liability under section 4979 for 1990 equal to 10 percent of the excess contributions that were in the plan as of December 31, 1990. However, this tax is not imposed on the $2,000 distributed on March 1, 1991, or the amount corrected by QNECs. X must pay an excise tax of $200, 10 percent of the $2,000 of excess contributions distributed after March 15, 1991. This tax must be paid by March 31, 1992.

(d) *Effective date*—(1) *General rule.* Except as provided in paragraphs (d)(2) through (5), this section is effective for plan years beginning after December 31, 1986.

(2) *Section 403(b) annuity contracts.* In the case of an annuity contract under section 403(b), this section applies to plan years beginning after December 31, 1988.

(3) *Collectively bargained plans and plans of state or local governments.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between an employee representative and one or more employers ratified before March 1, 1986, this section does not apply to years beginning before the earlier of January 1, 1989, or the date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986). In the case of a plan maintained by a state or local government, the provisions of this section apply for plan years beginning after December 31, 1988.

(4) *Collectively bargained plans of state or local governments.* Notwithstanding paragraphs (d)(2) and (d)(3) of this section, in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and state or local governments (ratified before March 1, 1986) or an annuity contract (described in paragraph (d)(2) of this section) under section 403(b) (maintained pursuant to a collective bargaining agreement described in paragraph (d)(3) of this section) the amendments made by this section do not apply to years beginning before the earlier of:

(i) The later of January 1, 1989, or the date on which the last collective bargaining agreement terminates (determined without regard to any extension thereof after February 28, 1986); or

(ii) January 1, 1991.

(5) *Plan years beginning before January 1, 1992.* For plan years beginning before January 1, 1992, a reasonable interpretation of the rules set forth in section 4979, as in effect during those years, may be relied upon in determining whether the excise tax is due for those years.

PART 602—OMB CONTROL NUMBER UNDER THE PAPERWORK REDUCTION ACT

Par. 14. The authority citation for part 602 continues to read:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 15. Section 602.101(c) is amended by inserting in the appropriate place in the table, "§ 1.401(k)-1 * * * 1545-1069 and 1545-1039".

Fred T. Goldberg, Jr.,
Commissioner of Internal Revenue.

Approved: July 23, 1991.

Kenneth W. Gideon,
Assistant Secretary of the Treasury.

[FR Doc. 91-19010 Filed 8-8-91; 11:49 am]

BILLING CODE 4830-01-M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2676

Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal Interest Rates

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This is an amendment to the Pension Benefit Guaranty Corporation's regulation on Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal (29 CFR part 2676). The regulation prescribes rules for valuing benefits and certain assets of multiemployer plans under sections 4219(c)(1)(D) and 4281(b) of the employee Retirement Income Security Act of 1974. Section 2676.15(c) of the regulation contains a table setting forth, for each calendar month, a series of interest rates to be used in any valuation performed as of a valuation date within that calendar month. On or about the fifteenth of each month, the PBGC publishes a new entry in the table for the following month, whether or not the rates are changing. This amendment adds to the table the rate series for the month of September 1991.

EFFECTIVE DATE: September 1, 1991.

FOR FURTHER INFORMATION CONTACT: Deborah C. Murphy, Attorney, Office of the General Counsel (22500), Pension Benefit Guaranty Corporation, 2020 K Street, NW., Washington DC 20006; 202–778–8820 (202–778–8859 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The PBGC finds that notice of and public comment on this amendment would be impracticable and contrary to the public interest, and that there is good cause for making this amendment effective immediately. These findings are based on the need to have the interest rates in this amendment reflect market conditions that are as nearly current as possible and the need to issue the interest rates promptly so that they are available to the public before the beginning of the period to which they apply. (See 5 U.S.C. 553 (b) and (d).) Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply (5 U.S.C. 601(2)).

The PBGC has also determined that this amendment is not a "major rule" within the meaning of Executive Order 12291 because it will not have an annual effect on the economy of $100 million or more; or create a major increase in costs or prices for consumers, individual industries, or geographic regions; or have significant adverse effects on competition, employment, investment or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

List of Subjects in 29 CFR Part 2676

Employee benefit plans and Pensions.

In consideration of the foregoing, part 2676 of subchapter H of chapter XXVI of title 29, Code of Federal Regulations, is amended as follows:

PART 2676—VALUATION OF PLAN BENEFITS AND PLAN ASSETS FOLLOWING MASS WITHDRAWAL

1. The authority citation for part 2676 continues to read as follows:

Authority: 29 U.S.C. 1302(b)(3), 1399(c)(1)(D), and 1441(b)(1).

2. In § 2676.15, paragraph (c) is amended by adding to the end of the table of interest rates therein the following new entry:

§ 2676.15 Interest.

* * * * *

(c) *Interest Rates.*

For valuation dates occurring in the month:	The values for i_k are:														
	i_1	i_2	i_3	i_4	i_5	i_6	i_7	i_8	i_9	i_{10}	i_{11}	i_{12}	i_{13}	i_{14}	i_{15}	i_u
* * * * * * *																
September 1991	.075	.07375	.0725	.07125	.07	.0675	.0675	.0675	.0675	.0675	.0625	.0625	.0625	.0625	.0625	.05875

Issued at Washington, DC., on this 8th day of August 1991.

James B. Lockhart III,

Executive Director Pension Benefit Guaranty Corporation.

[FR Doc. 91–19488 Filed 8–14–91; 8:45 am]

BILLING CODE 7708–01–M

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 535

Iranian Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Final rule; amendments to the list of persons whose assets are subject to blocking.

SUMMARY: Section 535.217 of the Iranian Assets Control Regulations, 31 CFR 535.217, is being amended to add the name Shams Pahlavi and remove the name Ashraf Pahlavi from § 535.217(b). Shams Pahlavi, sister of Mohammad Reza Pahlavi, the former Shah of Iran, is identified in § 535.217(b) as a person who has been served as a defendant in litigation in a court within the United States brought by Iran seeking the return of property alleged to belong to Iran. Shams Pahlavi is thereby identified as a person whose United States assets are blocked pursuant to the provisions of § 535.217(a). Reference to Ashraf Pahlavi is removed from § 535.217(b) based upon the final termination of all pertinent litigation against her. By virtue of the identification of Shams Pahlavi in § 535.217(b), the reporting requirements of 31 CFR 535.619 become applicable to persons within the jurisdiction of the United States with knowledge of the property or interests of Shams Pahlavi.

EFFECTIVE DATE: August 15, 1991.

FOR FURTHER INFORMATION CONTACT: William B. Hoffman, Chief Counsel, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel. 202/535–6020 or Loren L. Dohm, Chief, Blocked Assets Section, Tel. 202/535–4028.

SUPPLEMENTARY INFORMATION: The Office of Foreign Assets Control is amending § 535.217(b) of the Iranian Assets Control Regulations, 31 CFR part 535, to reflect changes in the status of litigation brought by Iran against close relatives of the former Shah of Iran seeking the return of property alleged to belong to Iran. Shams Pahlavi is identified in § 535.217(b) based on proof of service upon her in litigation of the type described in § 535.217(a). Pursuant to that provision, all property and assets located in the United States within the control of Shams Pahlavi are blocked until all litigation against her described in § 535.217(a) is finally terminated. Reference to Ashraf Pahlavi, also a sister of the former Shah of Iran, is removed from § 535.217(b) based upon the final termination of all pertinent litigation against her.

The identification of Shams Pahlavi in 31 CFR 535.217(b) makes applicable the reporting requirements of 31 CFR 535.619. Section 535.619 provides that persons subject to the jurisdiction of the United States shall file reports with respect to their knowledge of the property or interests of a person identified in § 535.217(b). The reports are to be submitted on Form TFR-619 to the Office of Foreign Assets Control.

Because the Regulations involve a foreign affairs function, Executive Order 12291 and the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are applicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, does not apply.

List of Subjects in 31 CFR Part 535

Administrative practice and procedure, Banking, Banks, Blocking of assets, Currency, Foreign investment in the United States, Iran, Penalties, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, title 31, part 535, subpart B of the Code of Federal Regulations is proposed to be amended as follows:

PART 535—IRANIAN ASSETS CONTROL REGULATIONS

1. The authority citation for part 535 continues to read as follows:

Authority: Secs. 201–207, 91 Stat. 1626, 50 U.S.C. 1701–1706; E.O. 12170, 44 FR 65729; E.O. 12205, 45 FR 24099; E.O. 12211, 45 FR 26685; E.O. 12276, 46 FR 7913; E.O. 12279, 46 FR 7919; E.O. 12280, 46 FR 7921; E.O. 12281, 46 FR 7923; E.O 12282, 46 FR 7925; E.O. 12283, 46 FR 7927, and E.O. 12294, 46 FR 14111.

Subpart B—Prohibitions

2. Section 535.217 is amended by revising paragraph (b) to read as follows:

§ 535.217 Blocking of property of the former Shah of Iran and of certain other Iranian nationals.

* * * * *

(b) Shams Pahlavi, sister of Mohammad Reza Pahlavi, the former Shah of Iran August 15, 1991.

* * * * *

Dated: August 5, 1991.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: August 8, 1991.

Peter K. Nunez,

Assistant Secretary (Enforcement).

[FR Doc. 91–19535 Filed 8–14–91; 8:45 am]

BILLING CODE 4810-25-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 100

[CGD11–91–08]

Special Local Regulations; Long Beach Offshore Challenge

AGENCY: Coast Guard, DOT.

ACTION: Temporary rule.

SUMMARY: Special local regulations are being adopted for the Long Beach Offshore Challenge. This event will be held on September 1, 1991, from 12 p.m. until 3 p.m. in the Outer Long Beach Harbor and Pacific Ocean just outside the Outer Long Beach Harbor. In case of postponement this event will be held on September 2, 1991, from 12 p.m. until 3 p.m. These regulations are needed to provide for the safety of life on navigable waters during the event.

EFFECTIVE DATES: These regulations become effective on September 1, 1991, at 11 a.m., and will terminate on September 1, 1991, at 4 p.m. In case of postponement these regulations will take effect on September 2, 1991, at 11 a.m., and terminate on September 2, 1991, at 4 p.m.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander T. G. Roberge, Chief of Group Operations, U.S. Coast Guard MSO/Group Los Angeles/Long Beach, CA. Tel: (213) 499–5550, FAX (213) 499–5576.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for these regulations and good cause exists for making them effective in less than 60 days from the date of publication. Following normal rulemaking procedures would have been impracticable. The details of the event were not finalized until June 21, 1991, and there was not sufficient time remaining to publish proposed rules in advance of the event or to provide for a delayed effective date. Nevertheless, interested persons wishing to comment may do so by submitting written views, data or arguments. Commenters should include their name and address, identify this notice (CGD11–91–08) and the specific section of the proposal to which the comments apply, and give reasons for their comments. Receipt of comments will be acknowledged if a stamped, self-addressed envelope is enclosed. The regulations may be changed in light of comments received.

Drafting Information

The drafters of these regulations are Lieutenant Commander T. G. Roberge, Chief of Group Operations, Coast Guard MSO/Group Los Angeles/Long Beach, and Lieutenant Commander Allen Lotz, Project Attorney, Eleventh Coast Guard District Legal Office, Long Beach, California.

Discussion of Regulation

The marine event requiring this regulation is called "Long Beach Offshore Challenge." This event is sponsored by Offshore Professional Tour (OPT), Inc., 1323 20th Terrace, Key West, Florida, 33040. This OPT sanctioned offshore power boat race will consist of approximately 35 race boats traveling in excess of 90 m.p.h. The race encompasses the following professional classes of offshore racers: Super, Open, Pro 1 and Pro 2. The course for Super and Open is 148 miles, and for Pro 1 and Pro 2 it is 115 miles. The race course will be marked by buoys positioned at various points along its several straightaways and turns. The regulated area will encompass the entire race area. Approximately 200 spectator boats are expected for the event. Spectators will be encouraged to view the race from within designated spectator areas.

The Coast Guard Captain of the Port Los Angeles/Long Beach will establish a safety zone that encompasses the race course and adjacent area to prohibit use of the federal anchorages within the boundaries of the race course.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water).

Regulations

In consideration of the foregoing, part 100 of Title 33, Code of Federal Regulations, is amended as follows:

PART 100—[AMENDED]

1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233; 49 CFR 1.46 and 33 CFR 100.35.

2. A temporary § 100.35–T9108 is added to read as follows:

§ 100.35–T9108 Long Beach Outer Harbor and the Pacific Ocean outside of the Long Beach Outer Harbor, California.

(a) *Regulated Area.* The area defined by the following points is the regulated area:

Beginning at—

Race marker #1, 33° 45′ 40″ N 118° 10′ 31″ W thence south to

Race marker #2, 33° 44′ 23″ N 118° 10′ 47″ W thence southeast to

Race marker #3, 33° 43′ 27″ N 118° 08′ 10″ W thence south to

Race marker #4, 33° 40′ 47″ N 118° 08′ 10″ W thence east to
Race marker #5, 33° 40′ 47″ N 118° 07′ 29″ W thence north to
Race marker #6, 33° 43′ 18″ N 118° 07′ 29″ W thence north-northwest to
Race marker #7, 33° 45′ 00″ N 118° 08′ 21″ W thence northwest to return to race marker #1.

(b) *Special Local Regulations.* (1) All persons and vessels that are not official patrol vessels or registered with the sponsors as participants are considered spectators. Official patrol vessels are any Coast Guard, public, state or local law enforcement, and sponsor-provided vessels assigned to patrol the event.

(2) No spectators shall anchor, block, loiter in or impede the through transit of participants and official patrol vessels in the regulated area during the effective dates and times, except as permitted by the Patrol Commander or a representative of the Patrol Commander aboard an official patrol vessel.

(3) While viewing the event at any point outside the regulated area is permitted, spectators are encouraged to congregate within designated spectator areas. These areas are located as follows: Spectator Area #1: Located within the race boundaries at a minimum distance of 100 yards away from the active race course, but not including the area south of turn points 3 and 6. The four corner points of Spectator Area #1 within the race course are as follows:

33°45′29″ N 118°10′25″ W
33°44′28″ N 118°10′35″ W
33°43′43″ N 118°07′58″ W
33°44′55″ N 118°08′29″ W

Spectator boats should be within the boundaries of spectator area #1 one half-hour prior to the beginning of the race. After the start of the race, any spectator boats wishing to enter or depart spectator area #1 must be escorted across the race course by an official patrol vessel. The sponsor will designate and mark one area along the course as a transit corridor in the event that a spectator vessel needs to leave the area and cross the race course. Exiting vessels must be escorted by an official patrol vessel and race control must be notified prior to crossing the race course.

Spectator Area #2: Located outside the race boundaries parallel to the leg between markers two and three, a triangular area with corner points as follows:

33° 43′ 54″ N 118° 10′ 09″ W
33° 43′ 32″ N 118° 10′ 17″ W
33° 43′ 32″ N 118° 08′ 49″ W

(4) Spectator vessels shall not loiter at the mouth of Alamitos Bay. Spectator vessels shall not enter that portion of Long Beach Harbor north of a line between race markers 1 and 7. Vessel traffic between Alamitos Bay and Downtown Marinas shall give a wide berth and remain outside of the entire regulated area. Outbound traffic from Alamitos Bay shall travel southeast from the channel entrance until well clear of the race course prior to heading out to sea.

(5) All outbound and inbound traffic from the Downtown marinas in Long Beach shall transit along the south side of the Los Angeles river mouth and transit along Pier J as they travel south towards the Queen's Gate entrance of the breakwater. The sponsor will provide adequate patrol vessels to guide all departing or returning vessels to the Downtown marinas and Alamitos Bay.

(6) When hailed or signaled by an official patrol vessel, a spectator shall come to an immediate stop. Vessels shall comply with all directions given by the Patrol Commander or a representative of the Patrol Commander aboard an official patrol vessel; failure to do so may result in a citation.

(7) The Patrol Commander is empowered to control the movement of all vessels in the regulated area. The Patrol Commander may terminate the event at any time it is deemed necessary for the protection of life or property. The Patrol Commander may be reached on VHF-FM Channel 16, when required, by the call sign "PATCOM."

(c) *Effective Dates*: These regulations will be effective from 11 a.m. to 4 p.m. on September 1, 1991. In case of postponement due to inclement weather this regulation will be effective from 11 a.m. to 4 p.m. on September 2, 1991.

Dated: August 7, 1991.

J. G. Schmidtman,

Captain, U.S. Coast Guard Commander, Eleventh Coast Guard District Acting.

[FR Doc. 91-19330 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-14-M

DEPARTMENT OF DEFENSE

Department of the Army

35 CFR Parts 251 and 253

Regulations of the Secretary of the Army (Panama Canal Employment System); Employment and Personnel Policy

AGENCY: Department of the Army, Defense.

ACTION: Final rule.

SUMMARY: This final rule amends parts 251 and 253 of title 35, Code of Federal Regulations, to reflect changes to the Panama Canal Employment System (PCES) for basic compensation and tropical differential for employees subject to the PCES. Two provisions of the Federal Employees Pay Comparability Act of 1990, Public Law 101-509, 104 Stat. 1389 (FEPCA), necessitated the revision of §§ 251.25, 251.31 and 251.32. Finally, coverage of the PCES for employees subject to the Civilian Intelligence Personnel Management System (CIPMS) is extended to include eligibility for the quarters allowance provided in the Panama Canal Act. These employees were previously included in the PCES for limited purposes, but were erroneously excluded from the quarters allowance provisions.

EFFECTIVE DATE: August 15, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Rhode, Jr., Secretary, Panama Canal Commission, 2000 L Street NW., suite 550, Washington, DC, 20036-4996 (telephone: (202) 634-6441) or Mr. Robert H. Rupp, Executive Director, Panama Area Personnel Board, APO Miami 34011-5000 (telephone in Corozal, Republic of Panama: 011-507-52-7890).

SUPPLEMENTARY INFORMATION: The Panama Canal Employment System (PCES) is established in section 1212 of the Panama Canal Act of 1979, Public Law 96-70, 93 Stat. 464, 22 U.S.C. 3652. Employees of the Panama Canal Commission are covered by the PCES as are the employees of those Department of Defense agencies in the Republic of Panama who have elected to be subject to its provisions. Pursuant to 22 U.S.C. 3655, the head of each member agency of the PCES shall establish rates of basic pay. In addition, pursuant to 22 U.S.C. 3652(c) and (d), the President may amend any provision of the PCES, may exclude any employee or position from PCES coverage and may extend to any employee the rights and privileges provided to employees in the competitive service. This authority has been delegated through the Secretary of Defense and the Secretary of the Army to the Chairman of the Panama Area Personnel Board. These regulations are promulgated pursuant to this authority. Issuance of a notice of proposed rulemaking under 5 U.S.C. 553 is not necessary because the final rule pertains only to personnel of agencies covered by these regulations.

Basic compensation for employees subject to the PCES is defined in 35 CFR 251.25 for employees entitled to additional remuneration from either the tropical differential in § 251.31 or the Panama Area differential of § 251.32 as including the base wage or salary plus

the applicable differential. This aggregate pay is considered basic compensation. This amount has, in some circumstances, been limited by §§ 251.31(b)(4) and 251.32(b)(2). Therein, the payment of the applicable differential was permitted only to the extent that such payment, when combined with the base wage or salary, did not exceed the GS–17, step 5 rate then in effect. This provision effectively set the maximum basic compensation an employee subject to the PCES was eligible to receive at the GS–17, step 5 rate. Two provisions of the Federal Employees Pay Comparability Act of 1990, Public Law 101–509, 104 Stat. 1389 (FEPCA), necessitate the revision of §§ 251.25, 251.31 and 251.32.

The elimination of grades GS–16, 17 and 18 in section 102(b)(1) of the FEPCA renders meaningless the GS–17, step 5 reference in §§ 251.31(b)(4) and 251.32(b)(2) which, as noted above, serves as the limitation on the amount of differential payable. The final rule removes the reference in both §§ 251.31 and 251.32. The GS–17 limitation is not, however, replaced in those sections with another limitation; rather, the new limitation is included in § 251.25 which, as stated previously, defines basic compensation. The imposition of the limitation on basic compensation (§ 251.25) rather than on the applicable differential (§§ 251.31 and 251.32) is not a substantive change because, according to existing regulations, basic compensation includes the applicable differential.

The new limitation in § 251.25 provides that basic compensation may not be paid at a rate in excess of the rate established from time to time for level V of the Executive Schedule. Setting the limitation at level V is consistent with that established for General Schedule employees in section 101(a)(1) of the FEPCA (5 U.S.C. 5303(f)). The level V pay cap will be applicable to all employees subject to the PCES except for the Deputy Administrator and Chief Engineer of the Panama Canal Commission.

The limitation on compensation for the Deputy Administrator and Chief Engineer positions is governed by 22 U.S.C. 3614(b) which had set the limitation at the GS–18 rate. Section 101(c)(1)(A)(i) of the FEPCA established that any existing reference to a maximum rate of pay at the GS–18 level shall henceforth be considered a reference to level IV of the Excecutive Schedule. Consistent with this statutory maximum, basic compensation (base salary plus differential, if applicable) for these two positions is established at a rate not in excess of the rate established from time to time for level IV of the Executive Schedule. The head of each member agency of the PCES has agreed to these established limitations in accordance with 22 U.S.C. 3655.

The second subject matter addressed in the final rule concerns medical doctors employed by either the Department of Defense or the Panama Canal Commission. Unlike other employees, medical doctors have been eligible for the tropical differential or the Panama Area differential regardless of their service date, place of recruitment or nationality. This longstanding less restrictive definition of differential eligibility applicable to medical doctors was based on demonstrated recruitment and retention problems concerning civilian physicians. Reductions in service responsibilities and relaxation of nationality requirements have eliminated the recruitment and retention problems of the past. As such, the payment of the differential to all medical doctors regardless of the circumstances is no longer warranted. Medical doctors will continue to be eligible to receive the differential upon meeting the same criteria applicable to other PCES employees which are set forth in §§ 251.31 and 251.32. In addition, each medical doctor currently receiving a differential will continue to receive the differential. This provision will not have retroactive effect; existing eligibility will be "grandfathered."

Finally, the rule extends the provisions of 22 U.S.C. 3657a regarding quarters allowance to certain intelligence-related positions which were formerly subject to the PCES but are now governed by the Civilian Intelligence Personnel Management System (CIPMS). These positions were previously excluded from the provisions of the PCES except for those provisions governing differentials and that exception is now being extended to the provisions of section 3657a regarding quarters allowance.

This final rule is not a major rule as defined in Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act, it is certified that this final rule will not have s significant impact on a substantial number of small business entities.

List of Subjects in 35 CFR Parts 251 and 253

Panama Canal Employment System, Army Secretary Regulations, Employment policy, Personnel policy.

Accordingly, 35 CFR parts 251 and 253 are amended as follows:

PART 251—REGULATIONS OF THE SECRETARY OF THE ARMY (PANAMA CANAL EMPLOYMENT SYSTEM)—PERSONNEL POLICY

1. The authority citation for part 251 continues to read as follows:

Authority: 22 U.S.C. 3614–3701, E.O. 12173, 12215.

2. Section 251.4 is amended by revising paragraph (h) to read as follows:

§ 251.4 Adoption of Panama Canal Employment System by Department of Defense.

* * * * *

(h) Positions at or above GS–8 and equivalent subject to the Civilian Intelligence Personnel Management System (CIPMS) are excluded from all the provisions of subchapter II and the regulations contained in this part and part 253, except that such positions are not excluded from the provisions of sections 1217, 1217a, and 1218 of subchapter II or the regulations in §§ 251.25, 251.31 and 251.32.

3. Section 251.25 is revised to read as follows:

§ 251.25 Basic compensation.

(a) For employees not entitled to the differential prescribed by § 251.31 or the additional remuneration prescribed by § 251.32, the rates of pay shall be the base salary or wage rates prescribed by § 251.13. For employees who are entitled to the differential prescribed by § 251.31 or the additional remuneration prescribed by § 251.32, the rates of pay shall be the base salary or wage rate plus the applicable differential or additional remuneration. The aggregate pay thus derived shall be considered basic compensation.

(b) An employee shall not be paid, except as provided in paragraph (c) of this section, basic compensation as defined in paragraph (a) of this section at a rate in excess of the rate of basic pay payable for Level V of the Executive Schedule.

(c) The Deputy Administrator and the Chief Engineer of the Panama Canal Commission shall not be paid basic compensation as defined in paragraph (a) of this section at a rate in excess of the rate of basic pay payable for level IV of the Executive Schedule.

4. Section 251.31 is amended by revising paragraphs (a), (b) introductory text, (b)(1), and (c), removing paragraph (b)(4), redesignating paragraph (b)(5) as (b)(4) and revising it, and adding paragraph (e) to read as follows:

§ 251.31 Tropical differential.

(a) An overseas tropical differential for an employee in the category established by § 251.12(b)(1) who is a United States citizen employee and who qualifies under the provisions of paragraph (b) of this section, shall be fixed by the head of each agency in an amount equal to 15 percent of the applicable base wage or salary established under § 251.13.

(b) The tropical differential prescribed by paragraph (a) of this section shall be paid to each United States citizen employee who qualifies under the following rules:

(1) To be eligible, the employee must have continuously occupied a position, other than a position the rates of pay for which are fixed in accordance with rates of pay for the same or similar work performed outside the continental United States, since: (i) Recruitment or transfer by a department from a place (other than the former Canal Zone) under the jurisdiction of the United States, or (ii) Separation from the Armed Forces of the United States or from employment with a United States firm, organization, or interest under conditions which provided by contract for return transportation to a place (other than the former Canal Zone) under the jurisdiction of the United States.

* * * * *

(4) Tropical differential may be paid only to an individual whose retention the head of the agency determines is essential.

(c) The rule set forth in paragraph (b)(1) of this section shall not disqualify the employee who has been continuously employed since July 3, 1976, and who on that date was: (1) Receiving a differential, (2) Not receiving a differential because the employee's spouse was receiving a differential or a housing or living quarters allowance, (3) Not receiving a differential because the employee was under 21, unmarried, and the child or stepchild of a resident of the former Canal Zone or the Republic of Panama, or (4) Not receiving a differential solely because such payment when combined with his or her aggregate compensation established under prior regulations in this subpart would have exceeded the then current rate of step 5, GS–17, of the General Schedule previously set out in 5 U.S.C. 5332(a).

* * * * *

(e) The rules set forth in paragraph (b)(1) of this section shall not disqualify an employee who has been continuously employed as a medical doctor since August 15, 1991 and who on that date was receiving the tropical differential.

5. Section 251.32 is amended by revising paragraph (b) and adding paragraph (d) to read as follows:

§ 251.32 Additional remuneration under Panama Canal Treaty.

* * * * *

(b) The Panama Area differential prescribed by paragraph (a) of this section shall be paid to each employee who qualifies under the following rules:

(1) An employee is eligible if recruited from outside the Republic of Panama for placement in Panama.

(2) The Panama Area differential may be paid only to an individual whose recruitment or retention the agency head determined to be essential.

* * * * *

(d) The rules set forth in paragraph (b)(1) of this section shall not disqualify an employee who has been continuously employed as a medical doctor since August 15, 1991, and who on that date was receiving the Panama Area differential.

PART 253—REGULATIONS OF THE SECRETARY OF THE ARMY (PANAMA CANAL EMPLOYMENT SYSTEM)—EMPLOYMENT POLICY

6. The authority citation for part 253 continues to read as follows:

Authority: 22 U.S.C. 2641–3701, E.O. 12173, 12215.

7. Section 253.8 is amended by revising paragraphs (b) introductory text and (d) to read as follows:

§ 253.8 Exclusions.

* * * * *

(b) The following positions are excluded from all the provisions of subchapter II (except sections 1217 and 1218) and from the regulations in this part and in part 251 of this chapter (except for §§ 251.25, 251.31 and 251.32 of this chapter):

* * * * *

(d) All Bureau Directors and Heads of Independent Units of the Panama Canal Commission are excluded from the provisions of sections 1212, 1213, 1215 and 1216 of subchapter II, subparts B and C of this part and subpart B of part 251, except for §§ 251.25, 251.31 and 251.32 of this chapter.

* * * * *

Dated: August 2, 1991.

M.P.W. Stone,

Chairman, Panama Area Personnel Board.

[FR Doc. 91–19370 Filed 8–14–91; 8:45 am]

BILLING CODE 3710–02–M

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 36

RIN 2900–AD33

Loan Guaranty: Approval and Withdrawal of Automatic Processing Privileges

AGENCY: Department of Veterans Affairs.

ACTION: Final regulations.

SUMMARY: The Department of Veterans Affairs (VA) is amending its loan guaranty regulations to set forth the requirements that lenders must satisfy to process VA guaranteed home loans on the automatic basis. VA is also amending its regulations to prescribe the standards and procedures for withdrawal of automatic processing authority. These amendments will clarify the procedures followed by VA in granting and withdrawing automatic processing authority.

EFFECTIVE DATE: These regulations are effective September 16, 1991.

FOR FURTHER INFORMATION CONTACT: Ms. Judith Caden, Assistant Director for Loan Policy (264), Loan Guaranty Service, Veterans Benefits Administration, (202) 233–3042.

SUPPLEMENTARY INFORMATION: Under chapter 37 of title 38, United States Code, VA guarantees a portion of the loan made to an eligible veteran to acquire or refinance a home, condominium, or manufactured home, or to install certain energy conservation features or other home improvements. The guaranty is a promise by the Government to pay a portion of the veteran's indebtedness in the event of a loan default and eventual termination through foreclosure or other proceedings.

VA guaranteed home loans are processed by lenders in one of two possible ways. Loans which are processed on the prior approval basis are forwarded by the lender to VA for approval of the loan prior to closing. VA underwrites the loan by reviewing the income and credit of the prospective borrower and advises the lender if VA will guarantee the loan. Loans processed on the automatic basis are underwritten by the lender and reported to VA after they are closed.

On August 17, 1990, VA published in the **Federal Register** (55 FR 33724) proposed regulations on the approval and withdrawal of automatic processing privileges. Four written comments were

received in response to the proposed regulations.

One commentor, a lender who presently has automatic processing authority, observed that the proposed regulations could result in its loss of such authority since it is affiliated with a homebuilding company. The proposed regulations do not preclude automatic processing authority for lenders affiliated with homebuilding companies. They prohibit closing on the automatic basis only on those loans in which the affiliated company is involved. The restriction does not apply to loans where no affiliates are involved. Moreover, the restriction is eliminated and affiliate loans are permitted on the automatic basis if the lender can establish that the lender and builder are separate entities and the lender's 90 day default rate for the prior year is no higher than the national average. Accordingly, this provision is being adopted as originally proposed.

Two commentors provided divergent opinions regarding VA's proposed $50,000 working capital requirement. The first, a lender, observed that the proposed $50,000 working capital requirement was too low and should be changed to a $1 million net worth requirement. The commentor observed that the $250,000 net worth requirement which FHA currently employs allows recovery on only two fraudulent FHA loans (presumably each involving a $125,000 loss). This commentor's opinion is that a substantial net worth is necessary to keep marginal lenders honest; lenders with little real net worth "play the edge (or worse) until they are caught," with the taxpayer paying the bill. However, another commentor, a trade association, observed that there is no evidence that equates net worth or working capital with loan quality. They further observed that preoccupation with achieving a net worth level at the expense of investing greater resources in personnel and training would detract from loan quality, particularly for the independent mortgage company.

VA has determined that the $50,000 working capital requirement should be retained. If a firm cannot maintain a bare minimum working capital of $50,000 its solvency cannot be assured. A firm that cannot meet obligations coming due could have a negative impact on a veteran home buyer who expects to close his or her loan on a specific date. In addition, such a firm might find itself relaxing its credit underwriting in order to qualify home buyers in order to obtain needed revenues to meet obligations. On the other hand, a firm which manages its financial affairs so as to always have working capital is able to pay its bills when they come due. The firm is solvent, and the risks to VA and veterans of dealing with insolvent firms are reduced or eliminated. By contrast, a large net worth is no guarantee that a firm will be able to meet its financial obligations; such a firm could well be asset rich and cash poor. This could lead to serious financial reversals if the firm is required to liquidate assets at distress prices in order to pay bills coming due.

Both of the remaining commentors, representing mortgage lenders, expressed much the same concerns regarding four key issues. First, as to eligibility and experience requirements, both are concerned that requiring each principal officer to demonstrate that he or she has at least three years recent experience (two in the case of manufactured home loan mortgage production) in the field of VA mortgages in managerial functions is unnecessarily restrictive and "would create an effective barrier to entry of existing mortgagees to begin originating VA-guaranteed loans." One commentor suggests instead that the final regulations be amended to provide that VA accept the requisite experience of one or more of the principal officers, rather than of each principal officer. Similarly, the other commentor recommends that the definition of "principal officer" be limited, for VA purposes, to include senior management only (senior vice presidents and above) with operations management responsibility.

As published in proposed form, these regulations included the long-standing requirement that the firm must have been actively engaged in originating VA mortgages for at least three recent years. VA would look to the experience of each of the principal officers only if the firm lacks the requisite experience. Since these requirements are in the alternative, VA is not persuaded by these comments that its requirement that each principal officer meet a minimum standard of three years (two in the case of manufactured home loans) in the field of VA mortgages in managerial functions is unnecessarily restrictive. Furthermore, VA guaranteed mortgages are unique; neither general mortgage lending experience nor experience with FHA loans can provide the necessary knowledge and background requisite to managing a VA loan workload. Should the firm lack the requisite minimum experience originating VA loans, it would be imprudent to limit the experiential requirements to only the more highly placed principal officers who are, by definition, more removed from the day-to-day supervision of mortgage lending.

The second issue of concern to these commentors is underwriter requirements. Specifically, both commentors would like VA to adopt regional underwriter provisions rather than maintaining a regulatory requirement that a lender have at least one full time designated underwriter in its home office and/or each approved regional branch office. VA has granted regional underwriting approval for individual lenders in certain cases. Pursuant to 38 CFR 36.4348(b)(6), lenders may, on a limited pre-approved basis, operate through regional underwriting offices. To be considered for regional underwriting approval, a lender must demonstrate that it needs such an internal underwriting structure and must have a proven quality performance and reliability record which shows that it can responsibly and effectively discharge its responsibilities to VA and to the veteran. Regional underwriting authority may be practical for larger lenders, but not necessarily for all lenders.

These two commentors also expressed concern regarding VA's proposed quality control requirements. One commentor felt that while VA generally should have access to a participating lender's quality control plan to assure compliance with the regulatory requirements, VA should not have direct access to findings on a specific loan level basis.

VA disagrees with the contention that lenders should not be required to provide its internal quality control findings to VA. The VA Monitoring Unit currently asks for and receives quality control reports from lenders. The Monitoring Unit reviews these reports to determine whether the lender is performing in-depth reviews of VA loans and uses the lender's findings as a basis for sampling. By obtaining these reviews, VA is able to determine: (i) That the lender does in fact have a quality control system in place; (ii) that it is being properly applied; and (iii) that corrective action is being taken by management when appropriate. Moreover, as the other commentor acknowledges, lenders are currently required to submit such information to FHA; there is no rational basis for distinguishing between FHA and VA loans with regard to quality control reports.

The second letter of comment regarding VA's quality control system welcomed VA's adoption of these new

requirements. This commentor had three specific concerns with respect to these new requirements in light of their members' experiences with FHA's quality control requirements. First, this commentor felt that FHA's requirement that a full Residential Mortgage Credit Report (RMCR) be ordered for all audited loans was expensive and unnecessary. Instead, this commentor recommends that VA permit lenders to use "in-files" for most cases, requiring that RMCRs be ordered on just 10 percent of the audited sample. VA does not accept this recommendation. "In-files" do not always provide sufficient information nor do they provide reverifications of information on such items as employment. VA does not believe that the requirement for a full RMCR for each audited loan is unnecessary or unduly expensive. Accordingly, as part of its quality control system, VA will require that a full RMCR be obtained for all audited loans.

This commentor also questioned whether VA considered rejected loans subject to audit. VA agrees that it has no liability on such loans and that the lender has no legal obligation to make a specific loan. Thus, a rejected loan is not covered by VA regulations and not subject to quality control review.

Third, with regard to VA's quality control requirements contained in these regulations, this commentor requested that VA consider giving lenders the option to use statistical sampling rather than flat percentage sampling. VA will consider the use of statistical sampling as part of its quality control requirements.

Finally, these two commentors expressed concerns with regard to the manner of withdrawal of automatic processing privileges. Specifically, these commentors were concerned that lenders receive written notice of VA's intention to withdraw their authority to process loans on the automatic basis and that such notice not be handled in an "informal, off-handed manner." They also requested that all relevant written notifications of lender deficiencies be sent from the same VA office that will be making a withdrawal decision, thereby eliminating the problem of receiving numerous notifications from different VA regional offices.

There is no "right" to continued status as an automatic lender in the VA home loan program, i.e., no right to a formal hearing for termination of automatic authority. Even so, the regulations do provide that the Secretary will provide 30 days notice of the Department's intention to withdraw automatic processing authority. VA does not consider the withdrawal of this authority lightly and has no intention of handling such notice in an "informal, off-handed manner." Furthermore, multi-jurisdictional lenders will not be subject to receiving numerous notifications from different field facilities. An individual VA field facility's authority to withdraw automatic processing privileges is limited to those lenders working solely within the field facility's jurisdiction. All withdrawals affecting multi-jurisdictional lenders will be processed by VA Central Office, upon referral by the local VA field facilities. Therefore, there will not be multiple notifications. Moreover, while the regulations provide that the VA field facilities may provide notice that they intend to withdraw automatic privileges for 60 days in certain specified violations, all determinations regarding withdrawal of automatic authority for longer periods of time or multi-jurisdictional lenders must be made in VA Central Office, which would also send out the notifications of such withdrawals.

These commentors expressed further concerns with regard to the withdrawal of automatic processing privileges. Specifically, one letter of comment requested that VA be given the flexibility to withdraw lenders for less than the prescribed number of days as set forth in the regulations and that, in the case of appeals, lenders be permitted to dispute VA's interpretation of applicable law and that the withdrawal be stayed during the appeal process.

On the first point, we would simply note that the power to withdraw authority for a certain period of time inherently includes the power to withdraw authority for a lesser period. On the second point, the hearings at issue are in the nature of fact-finding proceedings. They are not the appropriate forum for resolution of questions of law. However, the lender's right to raise and dispute questions of law as well as questions of fact in any judicial proceedings, before or after the VA hearing, is fully preserved. On the third point, automatic processing authority is considered a privilege, not a right. Should a lender raise a dispute over facts material to the withdrawal of automatic authority, a fact-finding hearing will be conducted as soon as possible. However, as a general matter, the withdrawal will not be stayed pending the outcome of the hearing. Accordingly, the regulations are adopted as originally proposed.

The Secretary hereby certifies that these regulatory amendments will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. These regulations simply incorporate into VA regulations the standards which VA uses under its statutory authority to grant automatic processing privileges. The regulations also formalize VA standards and procedures for withdrawing automatic processing privileges. However, these regulations do not impose any significant new administrative or paperwork burdens on small entities, and certain procedural protections are added for lenders. Pursuant to 5 U.S.C. 605(b), these regulations are exempt from the initial and final regulatory analysis requirements of sections 603 and 604.

The regulatory amendments have been reviewed pursuant to Executive Order 12291 and have been found to be nonmajor regulatory changes. The regulations will not impact on the public or private sectors as major rules. They will not have an annual effect on the economy of $100 million or more; cause a major increase in cost or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or have other significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Catalog of Federal Domestic Assistance Program Numbers are 64.114 and 64.119.

List of Subjects in 38 CFR Part 36

Condominiums, Handicapped, Housing, Loan programs—housing and community development, Manufactured Homes, Veterans.

These amendments are promulgated under authority granted the Secretary by sections 210(c), 1802(d), 1803(c)(1) and 1812(g) of Title 38, United States Code.

Approved: June 24, 1991.

Edward J. Derwinski,

Secretary of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 36, is amended as set forth below.

PART 36—LOAN GUARANTY

1. The authority citation for part 36, §§ 36.4201 through 36.4287 continues to read as follows:

Authority: Sections 36.4201 through 36.4287 issued under 72 Stat. 1114, 84 Stat. 1110 (38 U.S.C. 210, 1812).

2. The authority citation for part 36, §§ 36.4300 through 36.4375 continues to read as follows:

Authority: Sections 36.4300 through 36.4375 issued under 72 Stat. 1114 (38 U.S.C. 210).

3. Sections 36.4225, 36.4226, 36.4348 and 36.4349 are added to read as follows:

§ 36.4225 Authority to close manufactured home loans on the automatic basis.

(a) Supervised lenders of the classes described in 38 U.S.C. 1802(d) (1) and (2) are authorized by statute to process VA guaranteed manufactured home loans on the automatic basis. This category of lenders includes any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union or mortgage and loan company that is subject to examination and supervision by an agency of the United States or of any State or by any State.

(b) Nonsupervised lenders of the class described in 38 U.S.C. 1802(d)(3) must apply to the Secretary for authority to process manufactured home loans on the automatic basis. The following minimum requirements must be met:

(1) *Minimum assets.* A minimum of $50,000 of working capital must be maintained. Working capital is defined as the excess of current assets over current liabilities. Current assets are defined as cash or other assets that could readily be converted into cash within 1 year on the normal accounting or business cycle. Current liabilities are defined as obligations that would be paid within a year on a normal accounting or business cycle. The lender's latest financial statements (profit and loss statements and balance sheets), audited and certified by a CPA (certified public accountant), must accompany the application. If the date of the financial statement precedes that of the application by more than 6 months, the lender-applicant must also attach a copy of its latest internal quarterly report. In addition, the lender-applicant must agree that if the application is approved, the applicant will provide within 120 days following the end of each of its fiscal years an audited financial statement to the Director, Loan Guaranty Service for review.

(2) *Experience.* The firm must have been actively engaged in originating manufactured home loans for at least the last 2 years. Alternately, each principal officer of the firm who is actively involved in managing origination functions must have a minimum of 2 recent years' total experience in the field of VA manufactured home mortgages in managerial functions in either the present company of employment or in companies other than that of his or her present employment. In either case, every principal officer (president and vice presidents) must submit a resume of his or her experience in the mortgage lending field. Should the secretary and/or treasurer participate in the management of origination functions, they too must submit a resume and meet the minimum experience requirement if the company does not meet the experience requirement. Should the lender or any of its directors or officers ever have been debarred or suspended by any Federal agency or department or any of its directors or officers have been a director or officer of any other lender or corporation that was so suspended, or if the lender-applicant ever had a servicing contract with an investor terminated for cause, a statement of the facts must also be submitted. Lender-applicants will submit individual requests for each branch office they wish to have approved. The parent organization must agree to accept full responsibility for the actions of branch offices.

(3) *Underwriter.* If it is proposed that all loans to be made by the lender will be submitted to its home office for approval or rejection, the lender must have at least one full-time designated underwriter in its home office. If the loans will be approved or rejected by branch managers, the lender must have at least one full-time designated underwriter in each branch. In either event, the designated underwriters must be identified and a resume on each submitted to VA. The underwriters should have at least three years of experience in consumer installment finance. If changes in underwriting personnel occur, the lender must notify VA.

(4) *Lines of credit.* The identity of the source(s) of warehouse lines of credit must be revealed to VA and the applicant must agree that VA may contact the named source(s) for the purpose of verifying the information.

(5) *Secondary market.* If the lender-applicant customarily sells the manufactured home loans it originates, it must provide a listing of all permanent investors to whom the loans are sold, including the investor's address, telephone number and names of persons to contact.

(6) *Liaison.* The lender-applicant must designate one employee to act as liaison on its behalf with the VA. If possible, the lender-applicant should select employees other than VA approved underwriters to act as liaison. Officers from branch or regional offices should also be appointed to act as liaison with local VA offices. The lender must notify VA of any changes in liaison personnel.

(7) *Courtesy closing.* The lender-applicant must certify to VA that it will not close loans on an automatic basis as a courtesy or accommodation for other mortgage lenders whether or not such lenders are themselves approved to close on an automatic basis. The lender must agree that the processing of forms other than the initial credit application will not be delegated to the dealer or developer.

(8) *Subsidiaries/affiliates.* A lender approved for automatic processing may not close manufactured home loans on the automatic basis involving any dealership or manufacturer in which it has a financial interest or which it owns, is owned by, or with which it is affiliated. This restriction may be eliminated for lenders that can provide documentation which demonstrates to VA's satisfaction that (i) the lender and the manufacturer and/or dealer are separate entities that operate independently for each other, and (ii) the percentage of all VA manufactured home loans originated by the lender during at least a one-year period on which payments are past due 90 days or more is no higher than the national average for the same period for all mortgage loans.

(9) *Lender agents.* A lender using an agent to perform a portion of the work involved in originating and closing a VA guaranteed loan on an automatic basis must take full responsibility by certification or corporate resolution for all acts, errors and omissions of the agent and its employees. Any such acts, errors or omissions will be treated as those of the lender and appropriate sanctions may be imposed against the lender and its agent.

(10) *Minimum use of automatic authority.* If approved, lenders must use their automatic authority to the maximum extent possible. Any lender with automatic authority who submits a loan on the prior approval basis will be required to submit an explanation from the designated underwriter as to why the loan was not closed automatically. Such a statement will not be needed for loans that must be processed on the prior approval basis, e.g., joint loans.

(11) *Probation.* Lender-applicants meeting the requirements of this section will be approved to close loans on an automatic basis for a 1-year probationary period. Poor underwriting and/or consistently careless processing by the lender during the probationary

period will be a basis for withdrawal of automatic authority.

(12) *Quality control system.* In order to be approved as a nonsupervised lender for automatic processing authority, the lender must implement a written quality control system which ensures compliance with VA requirements. The lender must agree to furnish findings under its system to VA on demand. The elements of the quality control system must include the following:

(i) *Underwriting policies.* Each office of the lender shall maintain copies of VA credit standards and all available VA underwriting guidelines.

(ii) *Corrective measures.* The system should ensure the effective corrective measures are taken promptly when deficiencies in loan originations are identified by either the lender or VA. Any cases involving major discrepancies which are discovered under the system must be reported to VA.

(iii) *System integrity.* The quality control system should be independent of the loan production function.

(iv) *Scope.* The review of understanding decisions and certifications must include compliance with VA underwriting requirements, sufficiency of documentation and soundness of underwriting judgments.

(c) A lender approved to close loans on the automatic basis who subsequently fails to meet the requirements of this section must report the circumstances surrounding the deficiency and the remedial action to be taken to cure it to VA.

(Authority: 38 U.S.C. 210(c), 1803(c)(1), and 1812(g))

§ 36.4226 Withdrawal of authority to close manufactured home loans on the automatic basis.

(a)(1) As provided in 38 U.S.C. 1802(e), the authority of any lender to close manufactured home loans on the automatic basis may be withdrawn by the Secretary at any time upon 30 days notice. The automatic processing authority of both supervised and nonsupervised lenders may be withdrawn for engaging in practices which are imprudent from a lending standpoint or which are prejudicial to the interests of veterans or the Government but are of a lesser degree than would warrant complete debarment or suspension of the lender from participation in the program.

(2) Automatic processing authority may be withdrawn for failure to meet basic qualifying criteria. For non-supervised lenders, this includes lack of a designated underwriter, failure to maintain $50,000 working capital and/or failure to file required financial statements. For supervised lenders this includes loss of status as an entity subject to examination and supervision by a Federal or State supervisory agency as required by 38 U.S.C. 1802(d). During the 1 year probationary period for newly approved automatic lenders, automatic authority may be withdrawn based upon poor underwriting or consistently careless processing by the lender, as determined by VA.

(3) Automatic processing authority may also be withdrawn based on any of the causes for debarment set forth at § 44.305 of this title.

(b) Authority to close manufactured home loans on the automatic basis may also be temporarily withdrawn for a period of time under the following schedule.

(1) Withdrawal for 60 days:

(i) Automatic loan submissions show deficiencies in credit underwriting, such as use of unstable sources of income to qualify the borrower, ignoring significant adverse credit items affecting the applicant's creditworthiness, etc., after such deficiencies have been repeatedly called to the lender's attention;

(ii) Employment or deposit verifications are handcarried by applicants or otherwise improperly permitted to pass through the hands of a third party;

(iii) Automatic loan submissions are consistently incomplete after such deficiencies have been repeatedly called to the lender's attention by VA; or

(iv) There are continued instances of disregard of VA requirements after they have been called to the lender's attention.

(2) Withdrawal for 180 days:

(i) Loans are closed automatically which conflict with VA credit standards and which would not have been made by a lender acting prudently;

(ii) The lender fails to disclose to VA significant obligations or other information so material to the veteran's ability to repay the loan that undue risk to the Government results;

(iii) Employment or deposit verifications are allowed to be handcarried by applicant or otherwise mishandled, resulting in the submission of significant misinformation to VA;

(iv) Substantiated complaints are received that the lender misrepresented VA requirements to veterans to the detriment of their interests (e.g., veteran was dissuaded from seeking a lower interest rate based on lender's incorrect advice that such options were precluded by VA requirements);

(v) Closing documentation shows instances of improper charges to the veteran after the impropriety of such charges has been called to the lender's attention by Va, or refusal to refund such charges after notification by VA; or

(vi) There are other instances of lender actions which are prejudicial to the interests of veterans, such as deliberate delays in scheduling loan closings.

(3) Withdrawal for a period of from one year to three years:

(i) The lender fails to properly disburse loans (e.g., loan disbursement checks returned due to insufficient funds); or

(ii) There is involvement by the lender in the improper use of a veteran's entitlement (e.g., knowingly permitting the veteran to violate occupancy requirements, lender involvement in sale of veteran's entitlement).

(4) A continuation of actions that have led to previous withdrawal of automatic authority justifies withdrawal of automatic authority for the next longer period of time.

(5) Withdrawal of automatic processing authority does not prevent a lender from processing VA guaranteed manufactured home loans on the prior approval basis.

(6) Action by VA to remove a lender's automatic authority does not prevent VA from also taking debarment or suspension action based on the same conduct by the lender.

(7) VA field facilities are authorized to withdraw automatic privileges for 60 days, based on any of the violations set forth in paragraphs (b)(1) through (b)(3) of this section, for nonsupervised lenders without operations in other stations' jurisdictions. All determinations regarding withdrawal of automatic authority for longer periods of time or multi-jurisdictional lenders must be made in Central Office.

(c) VA will provide 30 days notice of withdrawal of automatic authority in order to enable the lender to either close or obtain prior approval for a loan on which processing has begun. There is no right to a formal hearing to contest the withdrawal of automatic processing privileges. However, if within 15 days after receiving notice the lender requests an opportunity to contest the withdrawal, the lender may submit in person, in writing, or through a representative, information and argument in opposition to the withdrawal.

(d) If the lender's submission in opposition raises a dispute over facts material to the withdrawal of automatic authority, the lender will be afforded an

opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witnesses VA presents. The Chief Benefits Director will appoint a hearing officer or panel to conduct the hearing.

(e) A transcribed record of the proceedings shall be made available at cost to the lender, upon request, unless the requirement for a transcript is waived by mutual agreement.

(f) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Chief Benefits Director shall make a decision on the basis of all the information in the administrative record, including any submissions made by the lender.

(g) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact will be prepared by the hearing officer or panel. The Chief Benefits Director shall base the decision on the facts as found, together with any information and argument submitted by the lender and any other information in the administrative record.

(Authority: 38 U.S.C. 210(c), 1803(c)(1), and 1812(g)).

§ 36.4348 Authority to close loans on the automatic basis.

(a) Supervised lenders of the classes described in 38 U.S.C. 1802(d) (1) and (2) are authorized by statute to process VA guaranteed home loans on the automatic basis. This category of lenders includes any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union or mortgage and loan company that is subject to examination and supervision by an agency of the United States or of any State or by any State.

(b) Nonsupervised lenders of the class described in 38 U.S.C. 1802(d)(3) must apply to the Secretary for authority to process loans on the automatic basis. The following minimum requirements must be met:

(1) *Minimum assets.* A minimum of $50,000 of working capital must be maintained. Working capital is defined as the excess of current assets over current liabilities. Current assets are defined as cash or other assets that could readily be converted into cash within 1 year on the normal accounting or business cycle. Current liabilities are defined as obligations that would be paid within a year on a normal accounting or business cycle. The lender's latest financial statements (profit and loss statements and balance sheets), audited and certified by a CPA (certified public accountant), must accompany the application. If the date of the financial statement precedes that of the application by more than 6 months, the lender-applicant must also attach a copy of its latest internal quarterly report. In addition, the lender-applicant must agree that if the application is approved, the applicant will provide within 120 days following the end of its fiscal year an audited financial statement to the Director, Loan Guaranty Service for review.

(2) *Experience.* The firm must have been actively engaged in originating VA mortgages for at least three recent years. Alternately, each principal officer of the firm who is actively involved in managing origination functions must have a minimum of three recent years' total experience in the field of VA mortgages in managerial functions in either the present company of employment or in companies other than that of his or her present employment. In either case, every principal officer (president and vice presidents) must submit a resume of his or her experience in the mortgage lending field. Should the secretary and/or treasurer participate in the management of origination functions, they too must submit a resume and meet the minimum experience requirement if the company does not meet the experience requirement. Should the lender or any of its directors or officers ever have been debarred or suspended by any Federal agency or department or any of its directors or officers have been a director or officer of any other lender or corporation that was so debarred or suspended, or if the lender-applicant ever had a servicing contract with an investor terminated for cause, a statement of the facts must also be submitted.

(3) *Underwriter.* The senior officer of the firm must nominate and recommend a full-time qualified employee(s) to act in the firm's behalf as underwriter(s) to personally review and make underwriting decisions associated with the submission of loans to VA which will be closed on the automatic basis. Nominees for underwriter must have a minimum of three years' experience in mortgage lending in reviewing credit and making underwriting decisions, with at least two recent years in connection with loans submitted to VA for guaranty. This experience must have been with an institutional investor originating for its own portfolio or purchasing this type of loan, or with an originator selling this type of loan to investors.

(4) *Lines of credit.* The lender-applicant must have one or more lines of credit aggregating at least $1 million. The identity of the source(s) of warehouse lines of credit must be revealed to VA and the applicant must agree that VA may contact the named source(s) for the purpose of verifying the information.

(5) *Secondary market.* If the lender-applicant customarily sells loans it originates, it must have a minimum of two permanent investors. These may consist of the Government National Mortgage Association (GNMA) and other government agencies, including State housing agencies, and the Federal National Mortgage Association (FNMA).

(6) *Lender processing.* The lender-applicant must agree that all prospective VA loans will be reviewed at its home or main office prior to closing and the decision to make or reject the loan will be made at that office by an approved underwriter, unless VA authorizes that company to operate through regional underwriting offices.

(7) *Liaison.* The lender-applicant must designate one employee and an alternate to act as liaison on its behalf with VA. If possible, the lender-applicant should select employees other than VA approved underwriters to act as liaison with VA.

(8) *Courtesy closing.* The lender-applicant must certify to VA that it will not close loans on an automatic basis as a courtesy or accommodation for other mortgage lenders, whether or not such lenders are themselves approved to close on an automatic basis, without the express approval of VA. However, a lender with automatic authority may close loans for which information and supporting credit data have been developed on its behalf by a duly authorized agent.

(9) *Lender agents.* A lender using an agent or any other entity, such as a real estate broker, to perform a portion of the work involved in originating and closing a VA guaranteed loan on an automatic basis must take full responsibility by certification, on the appropriate VA form, or by corporate resolution for all acts, errors and omissions of the agent or other entity and its employees for the work performed. Any such acts, errors or omissions will be treated as those of the lender and appropriate sanctions may be imposed against the lender and its agent or any other entity developing information used by the lender in underwriting and processing the loan.

(10) *Subsidiaries/affiliates.* A lender approved for automatic processing may not close loans on the automatic basis for any builder, real estate broker, or other entity in which it has a financial interest or which it owns, is owned by,

or with which it is affiliated. However, when the only relationship that exists between a lender and a builder is a construction loan, the lender may close the permanent mortgage on an automatic basis. This restriction may be eliminated for lenders that can provide documentation which demonstrates to VA's satisfaction that (i) the lender and builder or other affiliate are separate entities that operate independently of each other, and (ii) the percentage of all VA loans based on the affiliate's production originated by the lender during at least a one-year period on which payments are past due 90 days or more, is no higher than the national average for the same period for all mortgage loans.

(11) *Minimum use of automatic authority.* If approved, lenders should use their automatic authority to the maximum extent possible. Any lender with automatic authority who submits a loan on the prior approval basis will be required to submit an explanation from the VA approved underwriter as to why the loan was not closed automatically. Such a statement will not be needed for loans that must be processed on the prior approval basis; e.g., joint loans.

(12) *Probation.* Lender-applicants meeting the requirements of this section will be approved to close loans on an automatic basis for a one-year probationary period. Poor underwriting and/or consistently careless processing by the lender during the probationary period will be a basis for withdrawal of automatic authority.

(13) *Quality control system.* In order to be approved as a nonsupervised lender for automatic processing authority, the lender must implement a written quality control system which ensures compliance with VA requirements. The lender must agree to furnish findings under its systems to VA on demand. The elements of the quality control system must include the following:

(i) *Underwriting policies.* Each office of the mortgagee shall maintain copies of VA credit standards and all available VA underwriting guidelines.

(ii) *Corrective measures.* The system should ensure that effective corrective measures are taken promptly when deficiencies in loan originations are identified by either the lender or VA. Any cases involving major discrepancies which are discovered under the system must be reported to VA.

(iii) *System integrity.* The quality control system should be independent of the mortgage loan production function.

(iv) *Scope.* The review of underwriting decisions and certifications must include compliance with VA underwriting requirements, sufficiency of documentation and soundness of underwriting judgments.

(v) *Appraisal quality.* For lenders approved for the Lender Appraisal Processing Program (LAPP), the quality control system must specifically contain provisions concerning the adequacy and quality of real property appraisals. While the lender's quality control personnel need not be appraisers, they should have basic familiarity with appraisal theory and techniques so that they can select appropriate cases for review if discretionary sampling is used, and prescribe appropriate corrective action(s) in the appraisal review process when discrepancies or problems are identified. Copies of the lender's quality control plan or self-policing system evidencing appraisal related matters must be provided to the VA office of jurisdiction.

(c) A lender approved to close loans on the automatic basis who subsequently fails to meet the requirements of this section must report the circumstances surrounding the deficiency and the remedial action to be taken to cure it to VA.

(Authority: 38 U.S.C. 210(c), 1803(c)(1))

§ 36.4349 Withdrawal of authority to close loans on the automatic basis.

(a)(1) As provided in 38 U.S.C. 1802(e), the authority of any lender to close loans on the automatic basis may be withdrawn by the Secretary at any time upon 30 days notice. The automatic processing authority of both supervised and nonsupervised lenders may be withdrawn for engaging in practices which are imprudent from a lending standpoint or which are prejudicial to the interests of veterans or the Government but are of a lesser degree than would warrant complete suspension or debarment of the lender from participation in the program.

(2) Automatic processing authority may be withdrawn for failure to meet basic qualifying criteria. For non-supervised lenders, this includes lack of an approved underwriter, failure to maintain $50,000 working capital, and/or failure to file required financial statements. For supervised lenders this includes loss of status as an entity subject to examination and supervision by a Federal or State supervisory agency as required by 38 U.S.C. 1802(d). During the 1 year probationary period for newly-approved nonsupervised automatic lenders, automatic authority may be withdrawn based upon poor underwriting or consistently careless processing by the lender, as determined by VA.

(3) Automatic processing authority may also be withdrawn for any of the causes for debarment set forth at § 44.305 of this title.

(b) Authority to close loans on the automatic basis may also be temporarily withdrawn for a period of time under the following schedule.

(1) Withdrawal for 60 days:

(i) Automatic loan submissions show deficiencies in credit underwriting, such as use of unstable sources of income to qualify the borrower, ignoring significant adverse credit items affecting the applicant's creditworthiness, etc., after such deficiencies have been repeatedly called to the lender's attention;

(ii) Employment or deposit verifications are handcarried by applicants or otherwise improperly permitted to pass through the hands of a third party;

(iii) Automatic loan submissions are consistently incomplete after such deficiencies have been repeatedly called to the lender's attention by VA; or

(iv) There are continued instances of disregard of VA requirements after they have been called to the lender's attention.

(2) Withdrawal for 180 days:

(i) Loans are closed automatically which conflict with VA credit standards and which would not have been made by a lender acting prudently;

(ii) The lender fails to disclose to VA significant obligations or other information so material to the veteran's ability to repay the loan that undue risk to the Government results;

(iii) Employment or deposit verifications are allowed to be handcarried by applicant or otherwise mishandled, resulting in the submission of significant misinformation to VA;

(iv) Substantiated complaints are received that the lender misrepresented VA requirements to veterans to the detriment of their interests (e.g., veteran was dissuaded from seeking a lower interest rate based on lender's incorrect advice that such options were precluded by VA requirements);

(v) Closing documentation shows instances of improper charges to the veteran after the impropriety of such charges has been called to the lender's attention by VA, or refusal to refund such charges after notification by VA; or

(vi) There are other instances of lender actions which are prejudicial to the interests of veterans such as deliberate delays in scheduling loan closings.

(3) Withdrawal for a period of from one year to three years:

(i) The lender fails to properly disburse loans (e.g., loan disbursement checks returned due to insufficient funds);

(ii) There is involvement by the lender in the improper use of a veteran's entitlement (e.g., knowingly permitting the veteran to violate occupancy requirements, lender involvement in sale of veteran's entitlement, etc.).

(4) A continuation of actions that have led to previous withdrawal of automatic authority justifies withdrawal of automatic authority for the next longer period of time.

(5) Withdrawal of automatic processing authority does not prevent a lender from processing VA guaranteed loans on the prior approval basis.

(6) Action by VA to remove a lender's automatic authority does not prevent VA from also taking debarment or suspension action based on the same conduct by the lender.

(7) VA field facilities are authorized to withdraw automatic privileges for 60 days, based on any of the violations set forth in paragraphs (b)(1) through (b)(3) of this section, for nonsupervised lenders without operations in other stations' jurisdictions. All determinations regarding withdrawal of automatic authority for longer periods of time or multi-jurisdictional lenders must be made in Central Office.

(c) VA will provide 30 days notice of a withdrawal of automatic authority in order to enable the lender to either close or obtain prior approval for a loan on which processing has begun. There is no right to a formal hearing to contest the withdrawal of automatic processing privileges. However, if within 15 days after receiving notice the lender requests an opportunity to contest the withdrawals, the lender may submit in person, in writing, or through a representative, information and argument in opposition to the withdrawal.

(d) If the lender's submission in opposition raises a dispute over facts material to the withdrawal of automatic authority, the lender will be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witnesses VA presents. The Chief Benefits Director will appoint a hearing officer or panel to conduct the hearing.

(e) A transcribed record of the proceedings shall be made available at cost to the lender, upon request, unless the requirement for a transcript is waived by mutual agreement.

(f) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Chief Benefits Director shall make a decision on the basis of all the information in the administrative record, including any submission made by the lender.

(g) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact will be prepared by the hearing officer or panel. The Chief Benefits Director shall base the decision on the facts as found, together with any information and argument submitted by the lender and any other information in the administrative record.

(Authority: 38 U.S.C. 210(c), 1803(c)(1))

[FR Doc. 91-19424 Filed 8-14-91; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 57

RIN 0905-AD01

Educational Assistance to Individuals From Disadvantaged Backgrounds

AGENCY: Public Health Service, HHS.

ACTION: Final regulations.

SUMMARY: This final rule revises the regulations governing the program for Educational Assistance to Individuals from Disadvantaged Backgrounds authorized by section 787 of the Public Health Service Act (the Act), to implement amendments made by the Health Professions Reauthorization Act of 1988, by adding: (1) A definition for "community-based program"; (2) a requirement for certain schools, during a 3-year period, to increase their first-year enrollments of disadvantaged individuals by at least 20 percent over the base year of 1987; (3) a statutory priority in the award of grants, beginning in fiscal year 1992, to schools that attain specified increases in their enrollments of disadvantaged individuals; (4) a 10 percent funding set-aside obligation for community-based programs; and (5) a change in the amount of grant funds obligated to institutions of higher education from 80 percent to 70 percent. In addition, this rule also revises the existing regulations to conform with amendments made to section 787 of the Act by the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990, the Drug-Free Workplace Act of 1988, the Health Professions Training Assistance Act of 1985, the Compact of Free Association Act of 1985, the Omnibus Budget Reconciliation Act of 1981, and other changes which are ministerial and clarifying in nature. The Department believes that these amendments will provide eligible schools and entities a stronger base to carry out programs to continue to identify, recruit, and assist individuals from disadvantaged backgrounds that are underrepresented in the health professions to enter and graduate from health and allied health professions schools.

DATES: These regulations are effective August 15, 1991.

FOR FURTHER INFORMATION CONTACT: Clay E. Simpson, Jr., Ph.D., Director, Division of Disadvantaged Assistance, Bureau of Health Professions, Health Resources and Services Administration, Parklawn Building, Room 8A-09, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number: 301 443-2100.

SUPPLEMENTARY INFORMATION: On October 16, 1990, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the **Federal Register** (55 FR 41865), a Notice of Proposed Rulemaking (NPRM) to amend the existing regulations governing the Grants for Educational Assistance to Individuals from Disadvantaged Backgrounds, authorized by section 787 of the Public Health Act. Section 787 of the Act, as amended by Title VI of Public Law 100-607, the Health Professions Reauthorization Act of 1988, authorizes grants to schools of medicine, osteopathic medicine, public health, dentistry, veterinary medicine, optometry, pharmacy, allied health, chiropractic and podiatric medicine, and public and private nonprofit schools which offer graduate programs in clinical psychology, and other public or private nonprofit health or educational entities to carry out programs which assist individuals from disadvantaged backgrounds to enter and graduate from health professions and allied health professions schools. Regulations governing the Grants for Educational Assistance to Individuals from Disadvantaged Backgrounds are codified at 42 CFR part 57, subpart S.

The NPRM proposed to: (1) Add a definition for the term "community-based program" to implement the statutory requirement that 10 percent of the funds appropriated during any fiscal year be set aside for community-based programs; (2) add an eligibility requirement that an individual, in order to receive educational assistance, must "have completed at least the junior year of high school (or its equivalent)", so that program resources could be targeted at the earliest level in the educational pathway toward a health or allied health career where students have made tentative decisions and demonstrated interest in acquiring some of the knowledge and skills needed to seriously consider pursuing a health

career; (3) add a requirement that certain schools, during a 3-year period, must assure the Secretary that they will increase their first-year enrollments of disadvantaged individuals by a least 20 percent over the base year of 1987; (4) add a statutory priority in the award of grants, beginning in fiscal year 1992, to schools that attain specified increases in their enrollments of disadvantaged individuals; and (5) incorporate a statutory change in the amount of grant funds obligated to institutions of higher education from 80 percent to 70 percent.

The NPRM further added a number of technical and clarifying changes to conform the existing regulations with amendments made by Public Law 100–607; Public Law 101–121, the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990; Public Law 100–690, the Drug-Free Workplace Act of 1988; Public Law 99–129, the Health Professions Training Assistance Act of 1985; Public Law 99–239, the Compact of Free Association Act of 1985; and Public Law 97–35, the Omnibus Budget Reconciliation Act of 1981, and current departmental grants policy language.

The public comment period on the proposed regulations closed on December 16, 1990. The Department received one public comment, which is discussed below.

The commenter expressed concern over the decrease in the percentage of appropriated funds to be obligated to institutions of higher education from 80 to 70 percent, and further expressed hope that statutory funding priorities would not have a negative impact on funding of institutions which historically serve the disadvantaged. The Department appreciates the concerns of the commenter, however, the Department notes that both comments relate to statutory provisions. No changes have been made to the regulations as a result of these comments. The amendments, therefore, are adopted as set forth in the NPRM on October 16, 1990.

Regulatory Flexibility Act and Executive Order 12291

These regulations govern a financial assistance program in which participation is voluntary. The rule will not exceed the threshold level of $100 million established in section (b) of Executive Order 12291. For these reasons, the Secretary has determined that this rule is not a major rule under Executive Order 12291 and a regulatory impact analysis is not required. Further, because the rule does not have a significant economic impact on a substantial number of small entities, a regulatory flexibility analysis under the Regulatory Flexibility Act of 1980 is not required.

Paperwork Reduction Act of 1980

This final rule contains information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 and assigned control number 0915–0060. The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Grants for Educational Assistance to Individuals from Disadvantaged Backgrounds.

Description: Each grantee must meet the requirements of section 705 of the Act concerning audit and inspection.

Description of Respondents: State and local governments, nonprofit institutions.

Estimated Annual Reporting and Recordkeeping Burden:

Section No.	Annual No. of respondents	Annual frequency	Average burden per response	Annual burden hours
57.1810 [1]	160	1	4	640

[1] Grantee institutions must submit an audit report every 2 years as required by section 705 of the PHS Act. It has been estimated that the audit requires approximately 8 hours. This burden has been prorated over 2 years, producing an annual burden of 4 hours per grantee.

We received no public comments on the estimated public reporting burden, and it remains the same as in the proposed rule.

List of Subjects in 42 CFR Part 57

Dental health, Education of the disadvantaged, Educational facilities, Educational study programs, Grant programs—education, Grant programs—health, Health facilities, Health professions, Loan programs—health, Medical and dental schools, Student aid.

(*Catalog of Federal Domestic Assistance*, No. 93.822, Health Careers Opportunity Program)

Dated: May 17, 1991.

James O. Mason,

Assistant Secretary for Health.

Approved: July 5, 1991.

Louis W. Sullivan,

Secretary.

Accordingly, 42 CFR part 57, subpart S is amended as set forth below:

PART 57—GRANTS FOR CONSTRUCTION OF TEACHING FACILITIES, EDUCATIONAL IMPROVEMENTS, SCHOLARSHIPS AND STUDENT LOANS

Subpart S—Educational Assistance to Individuals From Disadvantaged Backgrounds

1. The authority citation for subpart S is revised to read as follows:

Authority: Sec. 215, Public Health Service Act, 58 Stat. 690, as amended by 63 Stat. 35 (42 U.S.C. 216); sec. 787, Public Health Service Act, 90 Stat. 2317, as amended by 95 Stat. 923, 99 Stat. 541, and 102 Stat. 3131–3132 (42 U.S.C. 295g–7).

2. Section 57.1802 is amended by adding the definition of "community-based program" and by revising the definitions of "health professions", "health professions schools", "nonprofit", "school of allied health", "Secretary", and "State" to read as follows:

§ 57.1802 Definitions.

* * * * *

Community-based program means a program whose organizational headquarters is located in and which primarily serves: A Metropolitan Statistical Area, as designated by the Office of Management and Budget; a Bureau of Economic Analysis, U.S. Department of Commerce designated nonmetropolitan economic area; a county; or Indian tribe(s) as defined in 42 CFR 36.102(c), i.e., an Indian tribe, band, nation, rancheria, Pueblo, colony or community, including an Alaska Native Village or regional or village corporation.

Health professions means the professions of medicine, dentistry, osteopathic medicine, pharmacy, optometry, podiatric medicine, veterinary medicine, public health, chiropractic, health administration, and clinical psychology.

Health professions schools means schools of medicine, dentistry, osteopathic medicine, pharmacy, optometry, podiatric medicine, veterinary medicine, public health, chiropractic, graduate programs in health administration, or graduate programs in clinical psychology, as defined in section 701(4) of the Act and as accredited in section 701(5) of the Act.

* * * * *

Nonprofit refers to the status of an entity owned and operated by one or more corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

School of allied health means a public or private nonprofit college, junior college, university or hospital-based educational entity which provides or is accredited to provide a degree program in an allied health discipline and which meets all the criteria in section 701(10) of the Act.

Secretary means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

State includes, in addition to the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands (the Republic of Palau), the Republic of the Marshall Islands, and the Federated States of Micronesia.

3. Section 57.1803 is amended by revising paragraph (a) to read as follows:

§ 57.1803 Who is eligible to apply for a grant?

(a) Health professions schools, schools of allied health, and public or private nonprofit health or educational entities which are located in a State and provide health or educational programs as one of their major functions may apply for a grant under this subpart. Each eligible applicant desiring a grant under this subpart shall submit an application in the form and at such time as the Secretary may prescribe.[1]

* * * * *

[1] Applications and instructions (Form PHS 6025–1, OMB #0915–0060) may be obtained from the Grants Management Officer, Bureau of Health Professions, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

4. Section 57.1804 is amended by revising paragraph (a), by redesignating paragraph (b) as (c), and by adding a new paragraph (b) to read as follows:

§ 57.1804 Who is eligible for educational assistance?

* * * * *

(a) Be a resident of the United States and either a citizen or national of the United States, an alien lawfully admitted for permanent residence in the United States, a citizen of the Commonwealth of the Northern Mariana Islands, a citizen of the Trust Territory of the Pacific Islands (TTPI) (consisting of the Republic of Palau), or a citizen of the Republic of the Marshall Islands or the Federated States of Micronesia (both formerly part of the TTPI);

(b) Have completed at least the junior year of high school (or its equivalent); and

* * * * *

5. Section 57.1805 is amended by removing the last sentence in paragraph (a)(5); by redesignating paragraph (b) as (c); and by adding new paragraphs (b) and (d) to read as follows:

§ 57.1805 Program requirements.

* * * * *

(b) The grantee must carry out at least two of the five purposes, even if grant funds are requested or awarded for only one of them.

* * * * *

(d) Grantees which: (1) Are schools of medicine, osteopathic medicine, public health, dentistry, veterinary medicine, optometry, pharmacy, allied health, chiropractic, pediatric medicine, and public and private nonprofit schools that offer graduate programs in clinical psychology; and

(2) Have a proportionate enrollment of individuals from disadvantaged backgrounds that is less than 200 percent of the national average percentage of such individuals in all schools of each health professions discipline must assure the Secretary that during a period of 3 years, commencing on the date of the award of the grant, they will increase their first-year enrollment of individuals from disadvantaged backgrounds by at least 20 percent over enrollments in the base year of 1987.

6. Section 57.1806 is amended by redesignating paragraphs (a) through (f) as paragraphs (1) through (6) and designating the introductory text as paragraph (a); by redesignating the concluding text of the section as paragraph (b) and revising it; and by adding a new paragraph (c) to read as follows:

§ 57.1806 How will applications be evaluated?

* * * * *

(b) Within the limits of funds available, the Secretary will award grants to approved applicants with projects that will best promote the purposes of section 787 of the Act. Of the amounts appropriated under this section for any fiscal year, 10 percent shall be obligated for community-based programs and 70 percent shall be obligated for grants to institutions of higher education and not more than 5 percent of such funds may be obligated for grants having the primary purpose of informing individuals about the existence and general nature of health careers. Section 787(a)(2)(g) authorizes the payment of such stipends as the Secretary may approve for participants in a project for any period of education at any school eligible for a grant under this subpart.

(c) *Funding priority.* (1) In determining the funding of applications approved under paragraph (a) of this section, the Secretary shall give priority to schools described in § 57.1805(d), beginning in fiscal year 1992—

(i) Which previously received a grant under this subpart and increased its first-year enrollment of individuals from disadvantaged backgrounds by at least 20 percent over that enrollment in the base year 1987 by the end of 3 years from the date of the award of the HCOP grant; and

(ii) Which had not previously received a grant under this subpart that increased its first-year enrollment of individuals from disadvantaged backgrounds by at least 20 percent over that enrollment in the base year 1987, over any period of time.

(2) In addition, should specific needs warrant, the Secretary will also consider other special factors relating to national needs as the Secretary may from time to time announce in the **Federal Register**.

7. Section 57.1807 is amended by removing the second sentence in paragraph (b), by removing paragraph (d), and by revising paragraph (c) to read as follows:

§ 57.1807 How long does grant support last?

* * * * *

(c) Neither the approval of any application nor the award of any grant shall commit or obligate the United States in any way to make any additional, supplemental, continuation or other award with respect to any approved application or portion of an approved application. For continuation support, grantees must make separate

application at such times and in such a form as the Secretary may prescribe.

8. Section 57.1808 is amended by revising paragraph (b), the introductory text to paragraph (c), paragraph (c)(2), the introductory text to paragraph (d), paragraph (d)(1), and paragraph (e) to read as follows:

§ 57.1808 For what purpose may grant funds be spent?

* * * * *

(b) Any balance of federally-obligated grant funds remaining unobligated by the grantee at the end of a budget period may be carried forward provided specific approval is granted by the Secretary. If at any time during the budget period it becomes apparent to the Secretary that the amount of Federal funds provided and made available to the grantee for that period, including any unobligated balance carried forward from prior periods, exceeds the grantee's needs for the period, the Secretary may adjust the amounts provided by withdrawing the excess. A budget period is an interval of time (usually 12 months) into which the project period is divided for funding and reporting purposes.

(c) The grantee may spend grant funds to provide one round trip for each individual in the program between his or her residence and the training site if:

* * * * *

(2) The educational assistance is not offered at a time when the individual would be at the training site as a student in a regular course of education leading to a high school diploma, associate degree, undergraduate degree, or degree in the health or allied health professions.

(d) The grantee may spend grant funds to pay individuals in the program a stipend when the grantee determines that:

(1) The condition in paragraph (c)(2) of this section exists;

* * * * *

(e) The grantee may not spend grant funds to pay tuition or fees, train program staff, retrain health professionals, or for sectarian instruction, or for any religious purpose.

9. Section 57.1809 is amended by revising the number in the citation of "45 CFR part 50, subpart D" to read "42 CFR part 50, subpart D;" by revising the footnote number and the footnote reference in the text cited after "45 CFR part 83" from "1" to "2"; and by adding in numerical order the following new CFR citations to read as follows:

§ 57.1809 What additional Department regulations apply to grantees?

* * * * *

45 CFR Part 76—Governmentwide Debarment and Suspension (non-procurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)

* * * * *

45 CFR Part 93—New Restrictions on Lobbying

10. Section 57.1810 is amended by adding a parenthetical statement at the end of the section text to read as follows:

§ 57.1810 What other audit and inspection requirements apply to grantees?

* * * * *

(Approved by the Office of Management and Budget under control number 0915–0060)

[FR Doc. 91-19475 Filed 8-14-91; 8:45 am]

BILLING CODE 4160-15-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91-27; RM-7549]

Radio Broadcasting Services; Castle Rock, WA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document indefinitely suspends the opening of the filing window for FM Channel 296C3 at Castle Rock, Washington, allotted in MM Docket No. 91-27. The window period for filing applications opened on July 23, 1991, and would have closed on August 22, 1991.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

EFFECTIVE DATE: August 15, 1991.

SUPPLEMENTARY INFORMATION: The final rule for this allotment was published at 56 FR 26921, June 12, 1991. This is a summary of the Commission's Order Staying Filing Window, MM Docket No. 91-27, adopted August 1, 1991, and released August 2, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

(47 U.S.C. 154, 303.)

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19368 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 1

[FCC 91-254]

Administrative Practice and Procedure; Computation of Time

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending the computation of the time rule to modify the so-called "day after the day" rule. Under this rule, as currently written, the first day to be counted in calculating time after a Commission action is usually two days after publication of a rule in the **Federal Register** or release of a non-rulemaking decision. The amendment reflects a change in the federal venue statute, 28 U.S.C. 2112(a)(1), and will eliminate confusion in the current rules by simplifying the rules. Under the amended rule, the first day to be counted in calculating time after a Commission action will usually be one day after publication of a rule in the **Federal Register** for release of a non-rulemaking decision.

EFFECTIVE DATE: October 15, 1991.

FOR FURTHER INFORMATION CONTACT: David H. Solomon, Office of General Counsel, Federal Communications Commission (202) 632-6990.

Order

Adopted: August 1, 1991;

Released: August 9, 1991.

By the Commission:

1. In this order, the Commission adopts changes to its rules regarding computation of time, 47 CFR 1.4. The amendments are discussed below and set forth below.

2. When a deadline is established for parties to take action, e.g., to file appeals or petitions for reconsideration following a Commission or staff decision or other action, our time computation rules provide that the first day to be counted is the day after the day of public notice of the decision or action.[1] Public notice, in turn, is defined as the day after certain specified dates, e.g., the date of **Federal Register** publication of a rule or the release date of a non-

[1] 47 CFR 1.4(b).

rulemaking decision.[2] Although the rules were clarified in 1987,[3] the definition of public notice continues to cause confusion.

3. The Commission's decision to define the date of public notice as the day after the date of the relevant Commission action was made "in order to make any 'race to the courthouse' a fair competition for all parties." [4] In 1988, however, Congress changed the federal venue statute to eliminate the "first-to-file" approach that had resulted in races to the courthouse and replaced it with a random selection approach involving all petitions for review filed within ten days of an agency action.[5] Accordingly, the need to define public notice so as to provide an extra day before the time period commences has been eliminated. Thus, we believe it is appropriate to amend section 1.4(b) of our rules to redefine public notice as "the day" that Commission action is taken, e.g., the day that decisions are published or released, and thereby eliminate any confusion that has existed under our current rules. The first day to be counted in making time computations would still be the day after public notice, as newly defined. Several examples contained in the rule are also being modified to reflect these amendments.[6]

4. Because the amendments adopted herein are matters of agency practice and procedure, notice and comment is not required. 5 U.S.C. 553(b)(A).

5. Accordingly, *It Is Ordered* That section 1.4 of the Rules and Regulations of the Federal Communications Commission Is Amended in the manner indicated below, to be Effective 60 days after publication in the **Federal Register.**[7]

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[2] *Id.*

[3] Amendment of the Rules Regarding Computation of Time. 2 FCC Rcd 7402 (1987), corrected, 3 FCC Rcd 6276 (1988).

[4] Addition of New Section 1.103, 85 FCC 2d 618, 621 (1981). Court appeals could not be filed prior to the date of "entry" of the decision, which under the rules, is the date of public notice. Defining the date of public notice as the day after the relevant decision date ensured that parties could not win courthouse races merely because of differences in time zones.

[5] Pub. L. No. 100-236, 101 Stat. 1731 (1988), codified at 28 U.S.C. 2112(a)(1). The Commission has adopted rules implementing the new venue statute. 47 CFR 1.13; Addition of New Section 1.13 to the Commission's Rules of Practice and Procedure, 4 FCC Rcd 2092 (1989).

[6] In addition, the Commission is amending section 1.4(j) to make more explicit the fact that the "filing date" is not determined under the rule until after all other computations are made.

[7] The new rules should be applied to determine the public notice date for Commission actions taken on or after the day the new rules become effective, while the current rules should be applied to determine the public notice date for Commission actions taken before the day the new rules take effect. For example, assuming the new rules take effect on September 11, the date of public notice for a Commission rule published in the **Federal Register** on September 11 would be September 11 (as determined pursuant to the new rules). However, again assuming the new rules take effect September 11, the date of public notice for a Commission rule published in the **Federal Register** on September 10 would be September 11 (as determined pursuant to the current "day after the day" rule).

6. Authority for this action is contained in sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j) and 303(r).

List of Subjects for 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission.

Donna R. Searcy,

Secretary.

Rule Changes

Part 1 (Practice and Procedure) of chapter 1 of title 47 of the Code of Federal Regulations is amended as follows:

PART 1—[AMENDED]

1. The authority citation for part 1 continues to read:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

§ 1.4 [Amended]

2. Section 1.4(b) is amended by removing the note preceding paragraph (b)(1), and adding the following sentence at the end of paragraph 1.4(b), following the word "holiday." to read as follows: "For purposes of this section, the term 'public notice' means the date of any of the following events:".

3. In Section 1.4(b)(1), the second sentence of Example 1 is revised to read as follows: "Public notice commences on Wednesday, May 6, 1987." In the third sentence, the phrase "Friday, May 8" is removed and the phrase "Thursday, May 7" is added in lieu thereof.

4. In Section 1.4(b)(1), Example 2 is removed.

5. In Section 1.4(b)91), Example 3 is redesignated as Example 2. In the second from the last sentence, the phrase "Friday, June 12" is removed and the phrase "Thursday, June 11" is added in lieu thereof. In the last sentence, the phrase "Friday, June 26" is removed and the phrase "Thursday, June 25" is added in lieu thereof.

6. In § 1.4(b)(2), Example 4 is redesignated as Example 3. The new Example 3 is revised to read as follows:

§ 1.4 Computation of time.

* * * * *

(b) * * *

(2) * * *

Example 3: The Chief, Mass Media Bureau, adopts an order on Thursday, April 2, 1987. The text of that order is not released to the public until Friday, April 3, 1987. Public notice of this decision is given on Friday, April 3, 1987. Saturday, April 4, 1987, is the first day to be counted in computing filing periods.

* * * * *

§ 1.4 [Amended]

7. In § 1.4(b)(3), the first sentence is amended by removing the phrase "at 3 p.m. Eastern Time on the day following" and adding in lieu thereof the phrase "on the day of". The second sentence is amended by removing the phrase "at 3 p.m. Eastern time on the day following the" and adding in lieu thereof the phrase "on the" before the words "release date,".

8. In § 1.4(b)(3), Example 5 is redesignated as Example 4. The new Example 4 is revised to read as follows:

* * * * *

(b) * * *

(3) * * *

Example 4: An order establishing an investigation of a tariff, and designating issues to be resolved in the investigation, is released on Wednesday, April 1, 1987, and is published in the **Federal Register** on Friday, April 10, 1987. If the decision itself specifies **Federal Register** publication, the date of public notice is Friday, April 10, 1987. If this decision does not specify **Federal Register** publication, public notice occurs on Wednesday, April 1, 1987, and the first day to be counted in computing filing periods is Thursday, April 2, 1987.

* * * * *

9. In § 1.4(b)(4), Example 6 is redesignated as Example 5. The final sentence of the example is revised to read as follows: "The date of public notice commences on the day of the release date."

10. In § 1.4(b)(4), Example 7 is redesignated as Example 6. The first sentence of the example is amended by removing the phrase "at 3 p.m. Eastern Standard Time September 3, 1987, the day after release.", and adding in lieu thereof the phrase "on September 2, 1987." In the second sentence the phrase, "Friday, September 4," is removed and the phrase, "Thursday, September 3," added in lieu thereof.

11. In § 1.4(b)(5), Example 8 is redesignated as Example 7 and the note currently following Example 8 is removed. The second sentence of the example is revised to read as follows: "The date of public notice commences on the day appearing on the license mailed to the applicant or appearing on

the face of the letter granting the waiver mailed to the licensee."

12. In § 1.4(c), Example 9 is redesignated as Example 8.

13. In § 1.4(d), Example 10 is redesignated as Example 9. The new example is revised to read as follows:

* * * * *

(d)* * *

Example 9: Paragraph 1.4(b)(1) of this section provides that "public notice" in a notice and comment rule making proceeding begins on the day of Federal Register publication. Paragraph 1.4(b) of this section provides that the first day to be counted in computing a terminal date is the "day after the day" on which public notice occurs. Therefore, if the commission allows or requires an action to be taken 20 days after public notice in the Federal Register, the first day to be counted is the day after the date of the Federal Register publication. Accordingly, if the Federal Register document is published on Thursday, July 23, 1987, public notice is given on Thursday, July 23, and the first day to be counted in computing a 20 day period is Friday, July 24, 1987. The 20th day or terminal date upon which action must be taken is Wednesday, August 12, 1987.

* * * * *

14. In § 1.4(d), Example 11 is removed.

15. In § 1.4(g), Example 12 is redesignated as Example 10.

16. In § 1.4(h), Example 13 is redesignated as Example 11.

17. In § 1.4(i), Example 14 is redesignated as Example 12.

18. In § 1.4(j), the first sentence is revised to read as follows: "If, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day." * * *

19. In § 1.4(j), Example 15 is redesignated as Example 13.

[FR Doc. 91-19438 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 90-449; RM-7430; RM-7595]

Radio Broadcasting Services; Morro Bay & Paso Robles, CA

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document allots Channel 231A to Morro Bay, California, as that community's second local FM service, in response to a petition for rule making filed on behalf of Don Stewart (RM-7430). See 55 FR 42861, October 24, 1990. Additionally, Channel 276A is allotted to Paso Robles, California, as that community's second local FM service, in response to a counterproposal filed on behalf of Paso Robles Broadcasters (RM-7595). Coordinates used for Channel 231A at Morro Bay are 35-21-48 and 120-50-42. Coordinates used for Channel 276A at Paso Robles are 35-37-54 and 120-41-24. With this action, the proceeding is terminated.

EFFECTIVE DATE: September 23, 1991. The window period for filing applications for Channel 231A at Morro Bay, and for Channel 276A at Paso Robles, California, will open on September 24, 1991, and close on October 24, 1991.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90-449, adopted July 29, 1991, and released August 9, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. § 73.202(b), the Table of FM Allotments under California, is amended by adding Channel 231A at Morro Bay and by adding Channel 276A at Paso Robles.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19428 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 90-537; RM-7455, RM-7684]

Radio Broadcasting Services; Amarillo, Claude and Dimmitt, TX

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Alton Lloyd Finley, Jr., allots Channel 259A to Amarillo, Texas. See 55 FR 48259, November 20, 1990. Channel 259A can be allotted to Amarillo, Texas, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. A counterproposal (RM-7684) to substitute Channel 239C1 for Channel 239A at Claude, Texas, and Channel 263C3 for Channel 240C3 at Dimmitt, Texas, will be considered in the context of MM Docket 90-547. the coordinates for Channel 259A at Amarillo are North Latitude 35-11-19 and West Longitude 101-48-55. With this action, this proceeding is terminated.

EFFECTIVE DATE: September 23, 1991. The window period for filing applications will open on September 24, 1991, and close on October 24, 1991.

FOR FURTHER INFORMATION CONTACT: Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90-537, adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st Street, NW., Washington, DC 20036.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Texas, is amended by adding Channel 259A at Amarillo.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19434 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 90-509; RM-7360]

Radio Broadcasting Services; Port Henry, New York, and Middlebury, VT

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of Pro-Radio, Inc., substitutes Channel 221C3 for Channel 221A at Port Henry, New York, modifies its license for Station WMNM(FM) to specify operation on the higher powered channel, substitutes Channel 216A for Channel 219A at Middlebury, Vermont, and modifies The Presidents and Fellows of Middlebury College's license for Station WRMC-FM to specify operation on the alternate Class A channel. See 55 FR 47346, November 13, 1990, and Supplemental Information, *infra*. With this action, this proceeding is terminated.

EFFECTIVE DATE: September 23, 1991.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 90-509, adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452-1422, 1714 21st Street NW., Washington, DC 20036.

Channel 221C3 can be allotted to Port Henry in compliance with the Commission's minimum distance separation requirements with regard to all domestic allotments at Station WMNM(FM)'s presently licensed transmitter site, at coordinates 44-01-38 and 73-28-54. We have confirmed that although the allotment is 7 kilometers (4.3 miles) short-spaced to the proposed allotment of Channel 221C1 at Ottawa-Hull, Ontario, Canada, there will not be any prohibited overlap of the protected contour of the proposed Ottawa-Hull allotment. Channel 216A can be allotted to Middlebury in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station WRMC-FM's pending application, at coordinates 44-01-34 and 73-09-44. Canadian concurrence in these allotments has been received because both communities are located within 320 kilometers of the U.S.-Canadian border.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

PART 73—[AMENDED]

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under New York, is amended by removing Channel 221A and adding Channel 221C3 at Port Henry.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19432 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

Proposed Rules

Federal Register
Vol. 56, No. 158
Thursday, August 15, 1991

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272 and 273

[Amdt No. 340]

Food Stamp Program: Employment and Training Provisions From the Mickey Leland Memorial Domestic Hunger Relief Act

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Mickey Leland Memorial Domestic Hunger Relief Act (Pub. L. 101-624) enacted on November 28, 1990, contains several provisions affecting the Food Stamp Program's Employment and Training (E&T) requirements. This rule proposes to implement four provisions from the Act that will: (1) Amend the current rules regarding the "head of household" designation; (2) change the current formula for distributing the non-performance based portion of the $75 million Federal E&T grant; (3) expand the E&T program to include literacy and self-employment training as E&T components; and (4) allow two State agencies that have received prior approval of an application to provide priority service to volunteers. This rule also proposes to change the date for submitting E&T plans. Finally, this rule proposes to exclude from the food stamp eligibility and allotment calculations certain child care reimbursements which are issued through the Aid to Families with Dependent Children (AFDC) program. These proposed amendments to the Food Stamp Program regulations are intended to improve the operation of the Food Stamp E&T program.

DATES: Comments must be received by September 16, 1991 to be assured of consideration.

ADDRESSES: Comments should be addressed to Ellen Henigan, Supervisor, Work Programs Section, Program Development Division, Food Stamp Program, Food and Nutrition Service, USDA, 3101 Park Center Drive, Alexandria, Virginia 22302. All written comments will be open to public inspection during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) at 3101 Park Center Drive, Alexandria, VA, room 718.

FOR FURTHER INFORMATION CONTACT: Questions regarding this rulemaking should be addressed to Ms. Henigan at the above address or by telephone at (703) 756-3762.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291 and Secretary's Memorandum 1512-1

This proposed rule has been reviewed under Executive Order 12291 and has been classified as not major because it does not meet any of the three criteria identified under the Executive Order. This action will not have an annual effect on the economy of $100 million or more, nor will it result in major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. Furthermore, it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Executive Order 12372

The Food Stamp Program is listed in the Catalog of Federal Domestic Assistance Programs under No. 10.551. For the reasons set forth in the final rule related Notice(s) of 7 CFR part 3015, subpart V (48 FR 29115), this Program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 through 612). Betty Jo Nelsen, Administrator of the Food and Nutrition Service (FNS), has certified that this action does not have a significant economic impact on a substantial number of small entities. State and local welfare agencies will be the most affected because they administer the Program.

Paperwork Reduction Act

This rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35). The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting and recordkeeping burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Title: Application Processing.

Description: The burden associated with Program application and application processing and the eligibility, certification, and continued eligibility of Program applicants is currently approved under OMB No. 0584-0064. The requirement in § 273.1(d) of this action that certain households must be allowed to choose their "head of household" does not alter or change the current burden estimates for applicant households. Current burden estimates already take into consideration that a "head of household" must be designated for every household by the State agency or the household, as required by regulations.

The proposed requirement in § 273.1(d) that specifies that the State agencies must provide a written notice to all households as appropriate will increase State agency burden. As proposed, the notice must identify which households have the option to select their head of household, the circumstances under which a household may change its designation, and how such changes must be reported to the State agency. It is anticipated that the State agencies will choose to implement this requirement by revising their notices for advising recipients of their rights and responsibilities. It is estimated that this reporting burden will be minimal. Because the burden is expected to be minimal, it will be submitted to OMB for approval along with the Department's upcoming revision to all burden associated with OMB No. 0584-0064, which expires in the near future.

Title: Revision of E&T Plan.

Description: State Welfare agencies are required, pursuant to 7 CFR 272.2 to plan and budget program operations and establish objectives for next year. The basic components of the State Plan of Operation are the Federal/State Agreement, the Budget Projection Statement, the Program Activity Statement, and certain attachments as specified at 7 CFR 272.2(c) and (d). One such attachment to the Plan is the E&T plan.

This proposed rule contains a requirement at § 273.7(c)(4)(viii) which specifies that State agencies specify a methodology for reporting accurate work registrant information if the State agency's reporting system count registrants more than once in a year or registers applicants who are exempt from work registration. The proposed requirement in § 273.7(c)(4)(viii) of this action does not alter or change current burden estimates approved under OMB No. 0584-0083 for the overall Plan of Operation. Certain portions of the State Plan are required to be updated annually, this includes the E&T plan, while others are required to be updated when a significant change occurs. The revision to the Plan that may result from this action is not required to be submitted separate from the annual update. Current burden approval for the State Plan of Operation estimates that State agencies will submit State Plan of Operation revisions or updates to various components of the State Plan of Operation at least once annually, regardless of the reason for this revision/update.

Description of Respondents: 53 State Welfare Agencies.

Estimated Annual Reporting and Recordkeeping Burden: Current burden estimates associated with the need for 53 State welfare agencies to submit revisions/updates on various components of the State Plan of Operation at least once annually is estimated to average 10 hours, per respondent, for a total burden of 530 hours annually.

Organizations and individuals desiring to submit comments regarding the burden estimates, or any aspects of the information collection requirement, including suggestions for reducing the burden, to Department of Agriculture, Food and Nutrition Service, Food Stamp Program, Program Development Division (address above); and to the Office of Information and Regulatory Affairs, OMB room 3208, New Executive Office Building, Washington, DC 20503, Attn: Laura Oliven, Desk Officer for FNS.

Background

Under section 6(d)(4) of the Food Stamp Act of 1977, as amended, (7 U.S.C. 2015(d)(4)), State welfare agencies have been required to operate Food Stamp Employment and Training (E&T) programs since April 1987. The intent of the E&T programs is to ensure that able-bodied food stamp recipients are involved in training, educational or work experience activities that will assist them in obtaining regular employment.

Section 6(d) of the Food Stamp Act requires all physically and mentally fit applicants to register for work as a condition of eligibility in the Food Stamp Program. Food Stamp recipients must register for work unless they are: (1) Under age 16 or age 60 or older; (2) age sixteen or seventeen and are enrolled in school or an employment training program on at least a half-time basis; (3) age sixteen or seventeen and are not the head of the household; (4) physically or mentally impaired; (5) caring for a child under age 6 or for another incapacitated household member; (6) receiving unemployment compensation; (7) regularly participating in a program for substance abuse; (8) working at least 30 hours a week or earning the equivalent of the Federal minimum wage times 30 hours; (9) students enrolled at least halftime; or (10) subject to and complying with the work requirement under title IV of the Social Security Act, as amended (42 U.S.C. 602). Program participants who are required to register for work are expected to meet E&T program requirements as a condition of eligibility.

The State agencies must, under 7 CFR 273.7(c)(5), submit a biennial E&T plan with annual updates to FNS for approval at least 45 days prior to the beginning of each Federal fiscal year. The State agencies are given flexibility in designing their E&T programs. They may elect which E&T activities or components to offer participants and are given the latitude to specify who among the work population will be served (i.e., E&T mandatories). The State agency may exempt certain work registrants from E&T participation if the State agency can justify that it is not practicable to provide E&T services to them. State agencies may, but are not required to, serve food stamp participants who are not work registrants (i.e., volunteers).

The State agencies are also required to meet established performance standards under 7 CFR 273.7(o). The current standards are process-based and measure the number of placements in E&T activities. Under the process-based standards, the State agencies are required to place at least 50 percent of their E&T mandatories into E&T activities. Pursuant to amendments made to the Food Stamp Act in Public Law 100-435 and Public Law 101-624, the State agencies must implement outcome-based standards on October 1, 1991. Outcome-based standards will measure the employment outcomes (i.e., number of E&T participants who find a job or have improved educational levels).

The Mickey Leland Memorial Domestic Hunger Relief Act

On November 28, 1990, the President signed the Food, Agriculture, Conservation and Trade Act of 1990 (Pub. L. 101-624). Title XVII of this Act, entitled the "Mickey Leland Memorial Domestic Hunger Relief Act" contains numerous provisions amending the Food Stamp Act of 1977, as amended. This rule proposes to implement four provisions from Public Law 101-624 that relate to the Food Stamp Program's E&T program. The first provision proposes to amend the current rules relating to the "head of household" designation. The second provision proposes to change the current method for distributing the non-performance based portion of the $75 million Federal E&T grant made to the States. The third provision proposes to specifically allow the State agencies to offer two new components in their E&T programs. The fourth provision proposes to allow two State agencies, with FNS approval, to give priority service to volunteers.

The Department is also proposing two modifications to the rules which are not required by Public Law 101-624. First, the Department is proposing a minor change in the submission date for the E&T plans. Second, the Department is proposing to modify the current policy concerning child care deductions for households receiving reimbursements for child care from the Department of Health and Human Service's (DHHS) Job Opportunities and Basic Skills Training (JOBS) program or the Transitional Child Care (TCC) program. For reasons that will be discussed later, the Department believes these proposed changes are warranted at this time. Two technical corrections are also included in this rule.

These proposals are discussed in more detail in the following pages of the preamble to this proposed rule.

Designating the Head of Household

Section 1725 of Public Law 101-624 includes a provision that will affect the

current regulations with respect to designating the head of household. This section, which amends section 6(d)(1) of the Food Stamp Act of 1977, as amended (7 U.S.C. 2015(d)(1)), states:

The State agency shall allow the household to select an adult parent of children in the household as its head where all adult household members making application agree to the selection. The household may designate its head of household under this paragraph each time the household is certified for participation in the food stamp program, but may not change the designation during a certification period unless there is a change in the composition of the household.

Under current rules at 7 CFR 273.1(d), the designation of a head of household at the time of certification is used primarily for administrative purposes. In most situations, the State agency may designate the head of household or allow the household to do so. Current rules do not allow the State agency to impose special requirements on the head of household (e.g., appear for the certification interview). In two instances, the head of household designation is used to determine whether or not the household is subject to sanction for noncompliance with certain food stamp requirements. These two instances are the voluntary quit provisions at 7 CFR 273.7(n) and the E&T compliance requirements at 7 CFR 273.7(g).

Under the voluntary quit provisions, any household whose head of household voluntarily quits a job within 60 days prior to the date of application, or at any time during the certification period, is ineligible to receive food stamp benefits for 90 days. If the household member who voluntarily quits a job is not the head of household, no sanctions apply. Under the E&T requirements, if the head of household fails to comply with an E&T program requirement (e.g., attend a component activity), the household is disqualified from the program for a two-month period. If the noncompliant E&T participant is not the head of household, only the compliant household member is disqualified from the program for a two-month period. Therefore, in these situations, the head of household designation determines whether or not the household is eligible for program benefits.

When establishing whether an individual or the entire household is ineligible because of E&T violations, or whether the household is subject to voluntary quit provisions, the State agency must determine which household member is the principal wage earner. Current regulations at 7 CFR 273.1(d)(2) define the principal wage earner as the household member who provides the household with the greatest source of earned income in the two months prior to the date of application or to the date of the E&T violation. Current regulations further specify that, in order to be considered a principal wage earner, the household member must have been employed for at least 20 hours a week at the Federal minimum wage. Finally, current regulations prohibit children from being designated principal wage earner when they are living with an able-bodied parent or person acting as a parent.

The definition of head of household as the principal wage earner was initially established with the implementation of the voluntary quit provisions (44 FR 17982) on March 23, 1979. The intent of the voluntary quit provision under section 6(d) of the Food Stamp Act was to prevent the household's primary wage earner from quitting a job and then relying on the Program. Thus, tying the head of household definition to the principal wage earner was necessary to ensure that the voluntary quit provisions were implemented as intended. When the E&T program requirements were established through the Food Security Act of 1985 (Pub. L. 99–198) on December 23, 1985, the Department extended the use of the principal wage earner to apply to sanctions for E&T noncompliance. Therefore, if the principal wage earner is an E&T participant who refuses or fails to comply without good cause with E&T requirements, the entire household is disqualified for two months. If a household member other than the head of household fails or refuses to comply with E&T requirements, only the noncompliant household member is disqualified from the program. If there is no principal source of earned income in the household, the State agency must consider the head of household as the household member who had been designated at the time of the violation.

As a result of the changes to the Food Stamp Act made by section 1725 of Public Law 101–624, a household with an adult parent of children will be given the option to elect an adult parent as its head of household. This option must be given at each certification action or whenever there is a change in household composition. If the household does not express its desire to select its head of household, or if all of the adult members of the household cannot agree to the selection, then this rule proposes that the State agency designate the head of household.

Accordingly, the Department is proposing in this rule to amend 7 CFR 273.1(d)(1) to allow households with either adult parents and children or adults who have parental control over children in the household to select the adult parent as the head of household, provided all the adult household members agree to the selection. The rule further proposes at 7 CFR 273.1(d)(1) that households have the option to re-designate an adult parent of children or an adult who has parental control over a child as the head of household at each certification action or whenever there is a change in household composition. Finally, this rule proposes at 7 CFR 273.1(d)(1) to require the State agencies to advise all households in writing at the time of application and as otherwise appropriate of this option. The written notice must clearly identify those households which have the option to select their head of household, when this option is available, and how changes in the head of household designation must be reported to the State agency.

Section 1725 of Public Law 101–624 also affects current statutory and regulatory requirements with respect to the imposition of sanctions when the noncompliant household member moves from one food stamp household to another. Under section 6(d)(1)(B)(ii) of the Food Stamp Act of 1977, as amended, and 7 CFR 273.7(g)(1) of the current regulations, a sanctioned household may reapply and resume participation if the noncompliant individual leaves the household and the reamining household members are otherwise eligible or if a new and eligible person joins the household as the principal wage earner. If the noncompliant individual joins another food stamp household as its head (i.e., principal wage earner), the new household would remain ineligible to participate for the remainder of the disqualification period.

Under section 1725 of Public Law 101–624, if a sanctioned head of household leaves one household and mvoes into a household that has already chosen an adult parent of children as its head, the adult parent who was initially designated as the head of household would continue to be the head of household unless the household decides to re-designate the new member as the head of household and the new member is an adult parent children. Because, by law, households with adult parents and children must first be given the opportunity to select their head of household, this rule proposes that the current requirements at 7 CFR 273.7(g)(1) and 7 CFR 273.7(n)(1)(vi), which specify that the sanction must follow a noncompliant individual who joins another household as its head, would

only apply if the household elects to re-designate its head of household as specified under proposed §§ 273.1(d) (1) and (2).

Distribution of Federal E&T Funds

Section 16(h) of the Food Stamp Act (7 U.S.C. 2025(h)) authorizes the Secretary of Agriculture to distribute $75 million annually in unmatched Federal funds to State agencies to operate E&T programs. Under current rules at 7 CFR 273.7(d)(1)(i)(B), $15 million of the Federal E&T grant is distributed on the basis of the State agency's performance in the preceding calendar year. The remaining $60 million—the non-performance based portion of the Federal grant—is allocated on the basis of the average monthly number of food stamp participants in each State as a percentage of the average monthly number of participants nationwide.

Section 1753 of the Public Law 101–624, which amends section 16(h)(1) of the Food Stamp Act includes two provisions relating to the distribution of Federal E&T funds. The first affects the method for distributing the non-performance based portion of the E&T grant. The second relates to the performance-based portion of the Federal E&T grant.

Non-Performance Based Federal E&T Funds

One provision of section 1753 of Public Law 101–624 requires the Department to distribute the non-performance based Federal E&T grant ($60 million) on the basis of a State agency's percentage of work registrants as compared to the number of work registrants in the E&T program nationwide. Because this issue has been pertinent since the implementation of the Food Stamp E&T program, the following overview of the current allocation formula is being provided. A discussion of the comparability of the new allocation formula and the comparability of the current work registrant database will follow.

Current Procedure

Section 16(h)(1) of the Food Stamp Act currently authorizes the Secretary to allocate E&T funds among the States. Thus the current regulations at 7 CFR 273.7(d)(1)(i)(B) stipulate that the non-performance based portion of the Federal E&T grant be distributed on the basis of the average monthly number of food stamp participants in each State as a percentage of the average monthly number of participants nationwide (i.e., caseload).

Prior to publishing the current rule in final regulations (51 FR 47378) on December 31, 1986, the Department published a Notice of Proposed Rulemaking (NPRM) on October 1, 1986 (51 FR 35152) that would have distributed E&T funds on the basis of a State agency's work registrant population. The NPRM proposed to distribute the Federal grant on the basis of estimated number of work registrants in each State as a percentage of the number of work registrants nationwide (51 FR 35156).

Comments received in response to the NPRM were strongly against this method. The proposal would have based the work registrant numbers on the only source of such numbers at the time, the quality control (QC) database (i.e., the Integrated Quality Control System, or, IQCS). The IQCS database collects information from the QC sample of food stamp cases which are reviewed at both the State and Federal level. The QC work registrant data was not considered reliable enough by the State agencies to use for allocating funds.

Commenters on the proposed rule were concerned that some State agencies registered all household applicants and recipients for work even if the recipients were exempt by law from work registration (51 FR 47383). This procedure is known as "universal work registration." State agencies which utilize universal work registration code all applicants into the IQCS database as work registrants. Conversely, other commenters expressed concern that not all work registrants were correctly coded into the IQCS database because the information was not relevant to the QC error determination. Thus, some State agencies may have either overstated or understated their work registrant populations.

In response to these comments, the Department agreed that the work registrant information in the IQCS database was not reliable enough to serve as a basis for funding allocations and issued final regulations utilizing the nationwide food stamp participation, or caseload, data for the distribution of the federal grant. Participation data is uniformly reported and reliable.

Since the implementation of the final E&T program regulations, many State agencies have contended that this methodology does not target E&T funds equitably to the States which have greater proportions of work registrants or those who must be served with the E&T grant. These State agencies have stressed that funding tied directly to a State's work registrant population would allow them to increase the funds spent on each participant or would allow them to serve more participants.

Formula

Under section 1753 of Public Law 101–624, FY 1992 will be the first year in which State agencies receive the non-performance based portion of the E&T grant on the basis of their work registrant population. However, because distributing the non-performance based E&T grant based on a State agency's work registrant population will cause significant shifts in funding for most of the State agencies, the law requires that certain adjustments be made to the State agencies' grants to mitigate the loss in Federal funds some State agencies may experience in the first year the new formula is implemented. The adjustments will ensure that all the State agencies receive a minimum Federal E&T grant of at lest $50,000.

The first adjustment requires that the new allocation formula be phased in over a two year period. Therefore, in FY 1992, State agencies which will gain E&T funds must have their initial computed gain reduced by one-half. Conversely, those State agencies which will lose E&T funds will have their initial computed loss reduced by one-half. The initial computed gain or loss is the difference between the grant a State agency would have received in FY 1992 based on the new work registrant formula and the grant the State agency would have received in FY 1992 if the former participant-based method was used. As of FY 1993, the State agencies will begin to receive their entire grant amount, based on the new formula. The formula remains in effect through FY 1995.

The second adjustment in the allocation formula required under section 1753 ensures that no State agency, in any fiscal year, receives an E&T grant of less than $50,000. To effectuate this minimum level for States which would, through the formula, receive less than $50,000, State agencies allocated more than $50,000 will have their grant slightly reduced. However, under section 1753 of Public Law 101–624, if a reduction is necessary to ensure that all State agencies receive at last $50,000 in FY 1992, only those State agencies that would experience an increase in their E&T grants will have their grants reduced. This reduction will be proportionate to the number of work registrants in each State receiving more than $50,000 and which receive an increased allocation under the first adjustment described above, as compared to the total number of work registrants in all the States which would receive more than $50,000 and an increased allocation under the first

adjustment. In FYs 1993 through 1995, the reduction will be proportionate to the number of work registrants in each State agency receiving more than $50,000 as compared to the total number of work registrants in *all* the State agencies which would receive more than $50,000.

For instance, assume that ten of the 53 State agencies receiving E&T grants in FY 1992 would be initially allocated less than $50,000 using the new formula. A total of $10,000 is needed to ensure that the ten State agencies will receive $50,000. Twenty (20) of the remaining 43 State agencies have FY 1992 grants larger than what they would have received based on participation alone. Therefore, adjustments totalling $10,000 must be made to the allotments of each of the 20 State agencies that have increased allotments and will receive more than $50,000. Each State agency's share of the $10,000 will be proportionate to the number of work registrants in that State compared to the total number of work registrants in all 20 States. At this time, available data show that in FY 1992 only two State agencies will need to have their allotments raised to meet the $50,000 minimum.

Therefore, in FY 1992, the non-performance based E&T grants will be determined as follows:

Step 1—Determine the non-performance based Federal E&T grant which would be given to each State agency in FY 1992 using the same allocation formula as in FY 1991 (based on participation data from FY 1990).

Step 2—Using work registrant data from FY 1990, determine the funding level for FY 1992 on the basis of work registrants in each State as a percentage of work registrants nationwide.

Step 3—Adjust increases in FY 1992 allotments to reflect one half of the difference between the amounts derived from steps 1 and 2.

Step 4—Adjust decreases in FY 1992 funding to reflect one half of the difference between steps 1 and 2.

Step 5—If necessary, adjust E&T grants to ensure that all the State agencies receive at least $50,000 in non-performance based Federal E&T funds.

Step 6—If necessary, adjust all State agency grants which were increased and exceed $50,000 so the sum of all State agency grants will equal $60 million.

In FYs 1993–1995, the non-performance based E&T grants will be determined as follows:

Step 1—Using work registrant data from the previous FY, determine the funding level on the basis of work registrants in each State as a percentage of work registrants nationwide.

Step 2—If necessary, adjust E&T grants to ensure that all the State agencies receive at least $50,000 in non-performance based Federal E&T funds.

Step 3—If necessary, adjust all other State agency grants exceeding $50,000 in order that the sum of all State agency grants will equal $60 million.

Accordingly, the Department proposes in this rule to amend 7 CFR 273.7(d)(1)(i)(A) to specify that, in FYs 1992 through 1995, the non-performance based portion of the Federal E&T grant will be allocated on the basis of the State agency's work registrant population. This rule also proposes to incorporate the procedures for phasing-in the change in the allocation formula in FY 1992. Finally, this rule proposes to specify that no State agency shall receive less than $50,000 in any fiscal year.

Comparability of Data

When allocating E&T funds on the basis of a State agency's work registrant population, the legislative history (H.R. Conf. Rep. No. 96, 101st Cong., 2nd Sess., pg. 1101 (1990)) accompanying Public Law 101–624 stresses the need to use the most recent available and reliable data on individuals registered for work.

Since the implementation of the Food Stamp E&T Program in April 1987, the State agencies have been required under 7 CFR 273.7(c)(6) to submit quarterly E&T reports known as the FNS Form 583. The FNS Form 583 identifies the number of work registrants in each State as of each October 31st and the number of new work registrants in each of the remaining eleven months in the fiscal year.

The data collected through the FNS Form 583, which was unavailable prior to April 1987, is the most reliable source of work registrant information. Therefore, the Department intends to use data collected on the FNS Form 583 when distributing the non-performance based portion of the E&T grant to the State agencies. The problems associated with the IQCS database are not present with the FNS Form 583 data because the form reports the total number of work registrants. However, in order to further ensure that the 583 database remains the most reliable source of work registrant data, two additional issues must be addressed.

The first issue concerns those State agencies which utilize universal work registration. Many State agencies which operated a Work Incentive (WIN) program under the DHHS' Aid to Families with Dependent Children (AFDC) program utilized universal work registration as a method to ensure that all applicants met the registration requirement under the Social Security Act (SSA). Furthermore, because the State agencies are required under section 11(i) of the Food Stamp Act to offer applicants the opportunity to apply at the same time for food stamps, AFDC and, if applicable, the State agency's General Assistance Programs, some State agencies use a combined application. These State agencies may utilize universal work registration to ensure that each Program's registration requirement is met.

As of October 1, 1990, the Job Opportunities and Basic Skills (JOBS) training program under title IV–F of the SSA replaced the WIN program. The JOBS program does not have a registration requirement. Therefore, it is not certain if the State agencies which have been utilizing universal work registration will continue to do so in the future. In those State agencies that do, it is imperative that the State agency have a method to detect and report on the FNS Form 583 only those recipients who are subject to the Food Stamp Program's work registration requirements specified under section 6(d) of the Food Stamp Act and 7 CFR 273.7 (a) and (b) of the regulations. If State agencies cannot do this, their work registration population will be inflated and they will receive a disproportionate share of Federal funding.

The second issue with the database derived from the Form 583 concerns those State agencies that "double count" work registrants. Under section 6(d)(1) of the Food Stamp Act and 7 CFR 273.7(a) of the regulations, a recipient who is not otherwise exempt from work registration under 7 CFR 273.7(b), must register for work upon initial application and once every twelve months thereafter. Therefore, if the work registrant receives food stamp benefits for several months, discontinues benefits, but subsequently reapplies and is certified for program benefits prior to the end of the twelve months, the applicant does not have to be re-registered for work. Some State agencies do not have the capability to detect those applicants who have been work registered in the previous twelve months and re-register applicants whenever they apply for benefits. This inflates the State agency's reported number of work registrants. When funds are distributed on the basis of the State agency's work registrant population, the State agency would receive a disproportionate share of Federal E&T funds.

States currently adjust their 583 data to account for both of these issues. However, to ensure comparability of the work registration information reported

to FNS, the Department is proposing to require that certain State agencies provide additional information in their E&T plans. Under this proposal, State agencies which universally work register all applicants would have to specify their methodology for excluding from their reports those applicants who are exempt from work registration under 7 CFR 273.7(b) of the regulations. Similarly, State agencies which cannot provide FNS an unduplicated count of work registrants would have to specify in their E&T plans their methodology for excluding from their reports applicants who have already been registered for work in the past twelve months.

The Department believes that the State agencies will provide a suitable methodology for adjusting work registrant information. Therefore, information related to the methodology for adjusting work registrant data will not be considered part of the plan approval process, but will be included for information purposes only. However, the Department reserves the right to adjust a State agency's work registrant count to reflect a more accurate figure if it believes another methodology or another source of data will result in a more accurate count of work registrants. For example, if a State agency cannot explain why its percent of double-counted work registrants is far less than other State agencies with similar circumstances, the Department will adjust the State agency's figure. Under this proposal, the Department will advise a State agency of how the adjustment was determined. State agencies will have 30 days to submit another methodology which satisfies the Department's concern. If the revised methodology is not acceptable, the Department's figure will become official.

Accordingly, this rule proposes to amend 7 CFR 273.7(c)(4) by adding State plan requirements for ensuring that the reported number of work registrants on the FNS Form 583 complies with the regulations and is unduplicated.

Performance-Based Federal E&T Funds

As previously mentioned, current rules at 7 CFR 273.7(d)(1)(i)(B) require $15 million of the Federal E&T grant to be distributed on the basis of State agency performance. Section 1753 of Public Law 101–624 incorporates the regulatory provision at 7 CFR 273.7(d)(1)(i)(B) into the Food Stamp Act. Because this provision is already specified in the current regulations, no further regulatory amendment is necessary. The Department will continue to distribute $15 million of the Federal E&T grant on the basis of State agency performance.

Expansion of E&T Programs

Currently, section 6(d)(4)(B) of the Food Stamp Act and corresponding regulations at 7 CFR 273.7(f)(1), specify that the State agencies E&T programs must offer one or more of the following components: (1) Job search; (2) job search training; (3) workfare; (4) education; or (5) any other program that is designed to improve the employability of household members through actual work experience and/or training.

Section 1726 of Public Law 101–624 amends section 6(d)(4)(B) of the Food Stamp Act by adding two new activities to the list of potentially approvable E&T components. The first is any educational component that will improve a participant's literacy. The second is a component designed to improve the self-sufficiency of recipients through self-employment programs including programs that provide instruction for self-employment ventures.

Although these components were not identified in the Food Stamp Act prior to enactment of Public Law 101–624, State agencies have, since April, 1987, been given wide latitude in offering literacy components. The Department has also approved a self-employment component which provided self-employment classes and seminars to self-employed recipients or to recipients who were interested in starting small businesses.

Accordingly, the Department proposes in this rule to amend 7 CFR 273.7(f)(1) to include components that improve a participant's literacy or that are designed to increase self-sufficiency through self-employment. Prior to finalization of this provision, the Department will continue to consider requests from State agencies to operate literacy and self-employment components provided the components meet an acceptable level of effort by participants and are designed to improve the employability of household members through actual work experience or training, or both, as specified under 7 CFR 273.7(f)(1).

Priority Service to Volunteers

Since the implementation of the E&T program, there has been considerable debate about the merits of mandatory vs. voluntary employment programs. Proponents of mandatory work requirements, in general, believe mandatory requirements are necessary to ensure participant compliance in activities that may further enhance the recipient's ability to achieve self-sufficiency. Proponents of voluntary programs have argued that programs in which only the most motivated individuals participate foster more cooperation from participants and will eventually result in more positive results. Others have asserted that the success of a work program relates to how well the program is managed, not on the mandatory or voluntary nature of the program.

Section 1726 of Public Law 101–624 includes a provision that will allow two State agencies, upon FNS approval, to give priority service to voluntary participants (exempt and non-exempt) provided that the State agencies continue to meet nationally established performance standards. Therefore, State agencies that have received approval to provide priority service to volunteers must meet the performance standards that are in place and are required of all other State agencies. Once an application is approved, the State agency may provide service to volunteers through September 30, 1995. The requirements for submitting an application are discussed later in this preamble under "State Agency Applications."

Currently, under section 6(d) of the Food Stamp Act of 1977, as amended, and 7 CFR 273.7 of the regulations, the Food Stamp E&T program targets food stamp recipients who are registered for work. Work registrants who are not exempt from E&T participation are considered mandatory E&T participants. Under section 6(d)(1)(ii), mandatory E&T participants who fail, without good cause, to comply with E&T requirements must be disqualified from the Food Stamp Program for two months. Congress was explicit in its intent to establish a mandatory work program. As stated in the Senate report on the Food Security Act of 1985 (Pub. L. 99–198, Senate Report No. 99–145, pg. 245), the objective of the program, "* * * is to ensure that all States develop meaningful work programs to assist able-bodied recipients to move toward greater self-sufficiency by finding paid employment. In addition, the implementation of such work requirements will deter participation by able-bodied persons who refuse to comply with such requirements in exchange for their food stamp benefits" (S. Rep. No. 145, 99th Cong. 1st Sess. 245 (1985)).

Although the E&T program is primarily a mandatory program for work registrants, Congress further recognized that many recipients who are exempt from work requirements will volunteer. Citing the advantages, "* * * to participate in programs in which training and employment opportunities are available so that full-time jobs can be obtained and opportunities

expanded", Congress included provisions in Public Law 99–198 which would allow States to serve volunteers as an extension of their mandatory E&T program (S. Rep. No. 798, 99th Cong., 1st Sess. 248 (1985)). Thus, under current rules at 7 CFR 273.7(f)(4), E&T participants who are not participating on a mandatory basis are considered volunteers. Volunteers fall into two categories, "exempt" and "non-exempt" participants. Exempt participants are those food stamp recipients who are exempt from work registration but elect to participate in the E&T program. Non-exempt participants are those who are subject to work registration requirements and have completed, or are in the process of completing, a mandatory requirement and elect to participate in additional E&T activities.

Under current policy, volunteers may participate in any component offered to mandatory E&T participants. However, no component may be offered to volunteer participants only. An exception to this policy exists when the State agency sequences components in such a way that placements into a second or third component are considered voluntary. For instance, a State agency may require that all mandatory E&T participants complete a job search component before being placed in a second component such as education. Once the E&T mandatory participants have completed their required activity, the State agency may consider them non-exempt volunteers once they enter another component.

State agencies may provide service to food stamp recipients who volunteer, but are not required to do so. When providing service to volunteers, State agencies must continue to meet the required performance standard. As previously discussed, the current performance standard specified under 7 CFR 273.7(o) is a process-based standard that measures the percent of non-exempt work registrants, plus volunteers, who begin an E&T activity. On October 1, 1991, State agencies must implement outcome-based performance standards.

Volunteer Service—State Agency Applications

In accordance with section 1726 of Public Law 101–624, a State agency must receive approval of an application in order to provide priority service to volunteers. The Department proposes to review all applications from State agencies that wish to provide priority service to volunteers that are received within 90 days after final publication of this rule. The Department will then approve two applications and notify all State agencies that submitted an application of this decision 45 days after the deadline for submitting an application.

The State application to FNS must describe: (1) The characteristics of the volunteer population the State agency intends to serve (e.g., how many volunteers would be served, what percent of the volunteer population would be considered an E&T mandatory participant under normal program requirements and what percent would be exempt from work registration); (2) the component activities that will be offered to volunteer participants; (3) where the program will operate (i.e., Statewide or selected counties); (4) how long the State agency intends to offer priority volunteer service; and (5) the criteria the State agency plans to use to evaluate the effectiveness of the program.

The State agency's application must also provide assurances that: (1) Applicants who are subject to work registration under 7 CFR 273.7 (a) and (b) will continue to be subject to work registration as a condition of eligibility; (2) the State agency will meet required performance standards that are in place at the time the State agency implements priority volunteer service; (3) an organization outside of the administration of the State agency will conduct the evaluation of the program's effectiveness; and (4) the ongoing and final results of the evaluation will be provided to FNS.

The Department proposes in this rule to evaluate a State agency's application on the following criteria:

1. The description of the purpose, design and implementation strategy contained in the application.

2. The degree to which the State agency's application envisions increasing administrative efficiency and enhanced service to participants.

3. The quality of an evaluation plan that will show how voluntary service compares with the current mandatory E&T program.

4. How the State agency will encourage participation from recipients who have barriers to achieving self-sufficiency (i.e. limited education or little or no recent work history).

Once approved, the Department proposes to specify in this rule that the State agency must continue to meet the required performance standard under 7 CFR 273.7(o) and fulfill the appropriate reporting requirements (i.e., FNS Form 583). State agencies with approved applications must also submit a revised E&T plan incorporating the voluntary provisions approved in the application and identifying any necessary budgetary changes. In accordance with current rules at 7 CFR 273.7(d)(1)(i)(D), E&T program grants (i.e., the 100 percent E&T grant and funds that are shared equally by the State agencies and the Federal Government) will fund the administrative costs of the program. This applies to the operation of an approved volunteer program and the costs that are necessary to evaluate voluntary service.

Finally, the Department is proposing in this rulemaking to require the State agency to report annually on the number of volunteers who fail to complete an E&T activity. Even though the volunteers will not be subject to disqualification if they refuse to comply without good cause, the Department is interested in assessing the degree of compliance that occurs in a voluntary program.

Accordingly, the Department is proposing in this rule to add a new paragraph (f)(5) at 7 CFR 273.7 to specify that, with prior approval, two State agencies may provide priority service to volunteers.

Transitional Child Care Expenses—7 CFR 273.10(d)(1)(i)

On October 13, 1988 Pub. L. 100–485, the Family Support Act of 1988, was enacted. Title II of the Act (42 U.S.C. 602) establishes the JOBS program under Title IV–F of the Social Security Act (42 U.S.C. 681). The purpose of JOBS is to assure that needy families with children obtain the education, training, and employment that will help them avoid long-term welfare dependence. Title III of the Act, Supportive Services for Families, of the Statute provides for Transitional Child Care (TCC), extended child care for eligible families which have ceased to receive AFDC as a result of increased hours or of increased income from employment. Title III of the Family Support Act also specifies that any money received as payment for child care or any reimbursement for costs incurred for child care shall not be treated as income for purpose of any other Federal or federally-assisted program that bases eligibility for or the amount of benefits upon need, such as the food stamp program.

Under current food stamp policy, households which are obligated to pay child care providers and receive AFDC TCC payments as reimbursements for these expenses are entitled to a dependent care deduction from income for the amount of the obligated child care costs. For households whose child care expenses are paid by AFDC directly to the child care provider, a deduction is not allowed because the

household does not incur an obligation to pay the expense.

Since this policy was established, several concerns have been raised regarding a number of issues surrounding the policy.

First, this policy differs from other Food Stamp Program policy concerning reimbursements for expenses. Although AFDC child care and TCC payments are excluded from income by Federal law, they are reimbursements for past or future expenses, as defined at 7 CFR 273.9(c)(5). Regulations at 7 CFR 273.10(d)(1)(i) specifically prohibit the deduction of any expenses covered by an excluded reimbursement, including reimbursements under employment and training programs.

Second, this policy differs in certain aspects from the treatment of other federally excluded income. For example, the Department has stated, in Policy Interpretation Response System memorandum 90–23, that households which receive federally excluded title IV educational assistance identifiable as an allowance for child care costs and listed under miscellaneous personal expenses may not also receive an income deduction under 7 CFR 273.9(d)(1) for that dependent care.

Third, the policy is not consistent with the treatment of child care reimbursements in the Food Stamp Program E&T program. The E&T regulations at 7 CFR 273.7(d)(1)(ii)(D) specify that a household cannot receive a child care deduction for any portion of child care costs which are reimbursed.

Finally, food stamp policy is inconsistent with AFDC rules governing child care support services. The AFDC regulation at 45 CFR 255.3(e)(1) states that, if the State IV–A agency chooses to meet the cost of child care through a method other than the use of the child care disregard, the AFDC unit cannot receive the earned income disregard for child care, and the determination of eligibility and payment amount must be determined without considering child care costs or payments.

In order to make this policy internally consistent and to conform our policy to AFDC policy, the Department is proposing at 7 CFR 273.10(d)(1)(i) to disallow a deduction for child care expenses covered by a reimbursement from the JOBS program or TCC. This proposed change brings this policy in line with how the Department treats other like situations such as medical reimbursements.

Due Date for Plan Submissions

Under current rules at 7 CFR 273.7(c)(5), State agencies must submit their E&T plans to the Department 45 days prior to the beginning of the appropriate fiscal year. The Department has found that 45 days does not allow sufficient time for the Federal review and resolution of outstanding issues with the State agencies. To provide more time for the review, this rule proposes to have the plans submitted no later than August 1 prior to the fiscal year. Accordingly, this rule proposes to amend 7 CFR 273.7(c)(5) to specify that State E&T plans must be submitted no later than August 1 before the start of the fiscal year.

Technical Amendments

E&T Plans

Current regulations at 7 CFR 273.7(c)(4) state that interim E&T State plans are due to the Department by March, 1987. This date reflects the initial plan requirements for the E&T program. This rule proposes to remove this date as well as other outdated references to the initial start-up of the E&T program.

Current regulations at 7 CFR 273.7(c)(5) specify that plans shall be submitted "biannually" beginning with FY 1991. The Department intended that plans be submitted "biennially" (i.e., every two year, not "biannually" i.e., twice a year). Accordingly, this rule proposes a technical change to correct this mistake. Also, the submission of plans on a biennial basis began prior to FY 1991. The Department proposes to correct this technical error.

Plan of Operation Submission Requirements

Under current rules at 7 CFR 272.2, State agencies must submit a Plan of Operation. The Plan of Operation is made up of numerous planning documents that specify how the State agency intends to budget and plan the operation of the Food Stamp Program. Under 7 CFR 272.2(d), the E&T plan is one of the required planned documents that must be included in the Plan of Operation. The submission requirements for these documents is specified under 7 CFR 272.2(e). This rule proposes a conforming amendment at § 272.2(e) that will specify that the E&T plan must be submitted in accordance with 7 CFR 273.7(c)(5). This confirming amendment does not propose to change the current submission requirements specified at 7 CFR 273.7(c)(5).

Implementation

Fiscal year 1992 will be the first year to distribute the non-performance based portion of the Federal E&T grant on the basis of the State agency's work registrant population as a percentage of the work registration population nationwide. All other provisions contained in this rule are effective and must be implemented the first of the month beginning 120 days after the publication of this rule in final form.

List of Subjects in 7 CFR

Part 272

Alaska, Civil rights, Food stamps, Grant programs—social programs, Reporting and recordkeeping requirements.

Part 273

Administrative practice and procedure, Aliens, Claims, Food stamps, Fraud, Grant programs—social programs, Penalties, Reporting and recordkeeping requirements, Social security, Students.

Accordingly, 7 CFR parts 272 and 273 are proposed to be amended as follows:

1. The authority citation for Parts 272 and 273 continue to read as follows:

Authority: 7 U.S.C. 2011–2031.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. In § 272.2, a new paragraph (e)(9) is added to read as follows:

§ 272.2 Plan of operation.

* * * * *

(e) *Submittal requirements.* * * *

(9) The Employment and Training Plan shall be submitted as specified under § 273.7(c)(5).

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

3. In § 273.1, paragraph (d)(1) and the first sentence of paragraph (d)(2) are revised to read as follows:

§ 273.1 Household concept.

* * * * *

(d) *Head of household.* (1) A State agency shall not use the head of household designation to impose special requirements on the household, such as requiring that the head of household, rather than another responsible member of the household, to appear at the certification office to make application for benefits. When designating the head of household, the State agency shall allow the household to select an adult parent of children living in the household or an adult who has parental control over children living in the household as the head of household provided that all adult household members agree to the selection. The State agency shall permit such households to select their head at each

certification action or whenever there is a change in household composition. The State agency shall provide written notice to all households at the time of application and as otherwise appropriate that specifies the household's right to select its head of household in accordance with this paragraph. The written notice shall identify which households have the option to select their head of household, the circumstances under which a household may change it's designation of head of household, and how such changes must be reported to the State agency. If all adult household members do not agree to the selection or decline to select an adult parent as the head of household, the State agency may designate the head of household or permit the household to make another selection. For households that do not consist of adult parents and children or adults who have parental control of children living in the household, the State agency shall designate the head of household or permit the household to do so.

(2) For purposes of failure to comply with § 273.7 and § 273.22 (to the extent that workfare programs operated under this paragraph are included as components of State agency E&T programs), the head of household shall be the principal wage earner unless the household has selected an adult parent of children as specified in § 273.1(d)(1). * * *

* * * * *

4. In § 273.7:

a. The introductory text of paragraph (c)(4) is amended by removing the first two sentences and adding a new sentence in their place.

b. Paragraphs (c)(4)(viii) through (c)(4)(xi) are redesignated as paragraphs (c)(4)(ix) through (c)(4)(xii), respectively, and a new paragraph (c)(4)(viii) is added.

c. Paragraph (c)(5) is amended by removing the first sentence and revising the second sentence.

d. Paragraph (d)(1)(i)(A) is revised.

e. Paragraphs (d)(1)(i)(B) through (d)(1)(i)(F) are redesignated as paragraphs (d)(1)(i)(C) through (d)(1)(i)(G) respectively and a new paragraph (d)(1)(i)(B) is added.

f. Paragraphs (f)(1)(iv) and (f)(1)(v) are redesignated as paragraphs (f)(1)(vi) and (f)(1)(vii) respectively and two new paragraphs (f)(1)(iv) and (f)(1)(v) are added.

g. A new paragraph (f)(5) is added.

h. The fifth sentence in paragraph (g)(1) is amended by adding the words, "as specified under § 273.1(d)(1) or (d)(2)" after the words "joins another household as head of the household".

i. Paragraph (n)(1)(vii) is redesignated as paragraph (n)(1)(viii), the last three sentences of paragraph (n)(1)(vi) are redesignated as paragraph (n)(1)(vii) and the first sentence in newly designated paragraph (n)(1)(vii) is amended by adding the words, "as specified under § 273.1(d)(1) or (d)(2)" to the end of the sentence.

The additions and revisions read as follows:

§ 273.7 Work requirements.

* * * * *

(c) *State agency responsibilities.* * * *

(4) In accordance with 7 CFR 272.2(c)(v), each State agency must prepare and submit an employment training plan to its appropriate FNS Regional Office and to the FNS National Office.

* * * * *

(viii) The method the State agency uses to exclude applicants from being reported as work registrants on the quarterly report required under paragraph (c)(6) of this section if the State agency work registers all food stamp applicants (i.e., universal work registration) when the applicants are exempt from work registration as specified under paragraph (b) of this section or if the State agency work registers nonexempt participants whenever a new application is submitted and the participants may have already been registered within the past twelve months as specified under paragraph (a) of this section. If the method the State agency uses is questionable or unacceptable, FNS reserves the right to adjust a State agency's work registrant count. FNS shall advise a State agency of how the adjusted figure was determined and shall allow the State agency 30 days to submit another method for consideration by FNS.

* * * * *

(5) Plans shall be submitted biennially, 60 days before the start of the fiscal year. * * *

* * * * *

(d) Federal financial participation

(1) Employment and training grants. (i) * * *

(A) Except as otherwise provided in paragraph (d)(1)(i)(D) of this section, the nonperformance based Federal funding available in FYs 1992 through 1995 for employment and training grants shall be allocated on the basis of the average monthly number of work registrants in each State as a percentage of the average monthly number of work registrants nationwide. FNS will use work registrant data from the most recent Federal fiscal year. In FY 1992, each State agency shall receive an increase or decrease that is one-half of the difference between:

(*1*) An amount that is based on the percent of each State agency's caseload in FY 1990 as compared to the average monthly caseload nationwide; and

(*2*) An amount that is based on the percent of each State agency's work registrant population in FY 1990 as compared to number of work registrants nationwide.

(B) In FYs 1992 through 1995, no State agency shall receive less than $50,000 in nonperformance based Federal E&T funds. To ensure that no State agency receives less than $50,000 in FY 1992, each State agency that is allocated more than $50,000 and would receive an increase in its E&T grant shall have its grant reduced if necessary. The reduction shall be proportionate to the number of work registrants in each State receiving more than $50,000 *and* receiving an increase in its E&T grant as compared to the total number of work registrants in all the States receiving more than $50,000 coupled with increases in their E&T grants. To ensure that no State agency receives less than $50,000 in FYs 1993 through 1995, each State agency that is allocated to receive more than $50,000 shall have its grant reduced, if necessary, proportionate to the number of work registrants in each State as compared to the total number of work registrants in all the State agencies receiving more than $50,000. The funds from the reduction shall be distributed to State agencies initially allocated to receive less than $50,000.

* * * * *

(f) *Employment and training programs.* * * *

(1) *Components.* * * *

(iv) An educational program designed to improve an E&T participant's literacy.

(v) A program designed to improve the self-sufficiency of recipients through self-employment including programs that provide instruction for self-employment ventures.

* * * * *

(5) *Priority Service to Volunteers.* With prior approval from FNS, two State agencies may provide priority service to volunteers through September 30, 1995.

(i) To receive approval from FNS, a State agency shall submit an application that:

(A) Describes the volunteer population it intends to serve (e.g., number served, characteristics of the target group, percent of volunteer

population that are mandatory work registrants under normal E&T requirements and percent that are exempt from work registration);

(B) Describes the component activities that will be offered to volunteer participants;

(C) Identifies where the volunteer program will operate (i.e., Statewide or selected counties);

(D) Specifies the duration of the volunteer program;

(E) Identifies criteria the State agency will use to evaluate the effectiveness of the program;

(F) Provides assurances that applicants who are subject to work registration as specified under § 273.7 (a) and (b) are required to work register as a condition of eligibility;

(G) Provides assurances that the State agency will meet the established performance standards under § 273.7(o); and

(H) Provides assurances that the evaluation will be conducted by an organization separate from the administration of the State agency and that ongoing and final results of the evaluation will be provided to FNS.

(ii) State agencies which receive approval to provide priority volunteer service shall:

(A) Submit a revised E&T plan that incorporates the voluntary service provisions;

(B) Continue to report quarterly (i.e., Form FNS 583) as specified under paragraph (c)(6);

(C) Meet the performance standards as specified under § 273.7(o); and

(D) Submit data annually which show the number of volunteers who fail to complete an assigned E&T activity.

* * * * *

5. In § 273.10, paragraph (d)(1)(i) is amended by adding a new sentence at the end of the paragraph.

§ 273.10 Determining household eligibility and benefit levels.

* * * * *

(d) *Determining deductions.* * * *

(1) *Disallowed expenses.*

(i) * * * A child care expense which is reimbursed or paid for by the Job Opportunities and Basic Skills Training (JOBS) program under Title IV–F of the Social Security Act (42 U.S.C. 681) or the Transitional Child Care (TCC) program shall not be deductible.

* * * * *

Dated: August 9, 1991.

Betty Jo Nelsen,

Administrator.

[FR Doc. 91–19449 Filed 8–14–91; 8:45 am]

BILLING CODE 3410-30-M

7 CFR Part 278

[Amdt. No. 339]

Food Stamp Program: Authority To Require Retail Food Stores and Wholesale Food Concerns To Submit Taxpayer Identification Numbers

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Food Stamp Program regulations at 7 CFR part 278 to require participating retail food stores or wholesale food concerns to furnish to the Food and Nutrition Service (FNS) taxpayer identification numbers including (a) the social security numbers of certain owners and (b) the employer identification number of the firm. Confidentiality and nondisclosure safeguards of taxpayer identification numbers are included in this proposed rule. Compiling a data base of taxpayer identification numbers will help to ensure that only properly authorized firms participate in the program. This proposed rule is issued pursuant to section 1735 of Public Law No. 101–624, 104 Stat. 3359 (November 28, 1990) which amended the Social Security Act (42 U.S.C. 405(c)(2)(C)) and the Internal Revenue Code of 1986 (26 U.S.C. 6109).

DATES: Comments on this proposed rulemaking must be received on or before September 16, 1991 to be assured of consideration.

ADDRESSES: Comments should be submitted in writing to Dwight Moritz, Chief, Coupon and Retailer Branch, Food Stamp Program, Food and Nutrition Service, USDA, Alexandria, Virginia 22302. All written comments will be open to public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5 p.m., Monday through Friday) in room 706, 3101 Park Center Drive, Alexandria, Virginia 22302.

FOR FURTHER INFORMATION CONTACT: Dwight Moritz, Coupon and Retailer Branch, Benefit Redemption Division, Food and Nutrition Service, Alexandria, Virginia, 22302, or telephone (703) 756–3418.

SUPPLEMENTARY INFORMATION:

Classification

Executive Order 12291

The Department has reviewed this proposed rule under Executive Order 12291 and Secretary's Memorandum No. 1512–1 and has classified it as "not major". The rule will affect the economy by less than $100 million a year. The rule is not likely to result in a major increase in costs or prices for consumers, industries, government agencies, or geographic regions. There will be no adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Although this rule will affect the business community, the effect would be of a non-economic nature and is not expected to be significant.

Executive Order 12372

The Food Stamp Program is listed in the *Catalog of Federal Domestic Assistance* under No. 10.551. For the reasons set forth in the final rule and related Notice(s) to 7 CFR part 3015, subpart V (Cite 48 FR 29115, June 24, 1983 or 48 FR 54317, December 1, 1983, as appropriate, and any subsequent notices that may apply), this program is excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Regulatory Flexibility Act

This proposed rule has also been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (Pub. L. No. 96–354). The Administrator of the Food and Nutrition Service has certified that this action does not have a significant economic impact on a substantial number of small entities. The rule simply provides for the collection of additional information to ensure that only properly authorized retail food stores and wholesale food concerns participate in the program.

Paperwork Reduction Act

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting and recordkeeping burdens. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Form FNS–252, Food Stamp Program Application for Stores.

Description: In accordance with 7 CFR 278.1(a), the Department currently collects data from applicant retail food

stores and wholesale food concerns using the Form FNS-252. The Social Security Numbers and Employer Identification Numbers would be collected as part of this data submission. Thus, the total proposed annual burden hours increase would include collection of these numbers along with the additional collection of sales verification information. The OMB Control number assigned to the existing reporting and recordkeeping requirements of Form FNS-252 is OMB No. 0584-0008.

Description of Respondents: Retail food stores and wholesale food concerns.

Estimated Annual Reporting and Recordkeeping Burden:

Total Existing Burden Hours	18,679
Total Proposed Burden Hours	23,904
Total Difference	5,225

As required by section 3504(h) of the Paperwork Reduction Act of 1980, FNS has submitted a copy of this proposed rule to OMB for its review of these information collection requirements. Other organizations and individuals desiring to submit comments regarding this burden estimate or any aspects of these information collection requirements, including suggestions for reducing the burden, should direct them to the Coupon and Retailer Branch, Benefit Redemption Division, (address above) and to the Office of Information and Regulatory Affairs, OMB, room 3208, New Executive Office Building, Washington, DC 20503, Attn: Laura Oliven, Desk Officer for FNS.

Background

On November 28, 1990, the President signed the Food, Agriculture, Conservation and Trade Act of 1990, Public Law No. 101-624, 104 Stat. 3359. Section 1735 of that law amends the Social Security Act and the Internal Revenue Code of 1986 to provide FNS statutory authority to require retail food stores and wholesale food concerns to furnish the following taxpayer identification numbers (TINs): the social security account numbers (SSNs) of the owners of these firms and the firm's employer identification number (EIN). This rule proposes to amend the Food Stamp Program regulations to require the collection of the TINs, specify what use may be made of TINs, and reference the penalties for unauthorized disclosure and solicitation of TINs.

Compiling SSN and EIN data bases will help ensure that only properly authorized firms participate in the program. The Department will be able to compare the SSN of a person(s) applying for authorization, as well as the EIN of the applicant firm, against SSNs and EINs of firms in a national data base to prevent disqualified firms from being reauthorized before the disqualification period expires. The Department will also be able to identify firms which had been previously sanctioned for program violations and are again found to be in violation of program regulations. In such cases, firms are given more severe sanctions e.g., violations that would warrant a one-year disqualification for a first offender would result in a two-year disqualification for a second offense and permanent disqualification for a third offense (7 CFR 278.6(e)).

In accordance with the language of section 1735, this rule proposes that SSN and EIN information will be available only to officers and employees of the United States whose duties or responsibilities require access for the administration or enforcement of the Food Stamp Act. Further, no officer or employee of the Department of Agriculture shall have access to these numbers for any purpose other than the establishment and maintenance of a list of the names and social security account numbers and employer identification numbers for use in determining those applicants who have been previously sanctioned, or convicted, under section 12 or 15 of the Act (7 U.S.C. 2021, 2024). The Department may use this information on sanctions and convictions in administering section 9 of the Act (7 U.S.C. 2018).

The Department proposes to collect the EIN of each applicant or participating retail food store or wholesale food concern if one has been assigned by the Internal Revenue Service. The guidelines for requesting EINs reflect the provisions of Treasury Regulation § 301.6109-2 (26 CFR 301.6109-2).

This rule proposes to collect SSNs of owners of sole proprietorships and of partners in firms which are partnerships. If a partnership has both general and limited partners, SSNs are required only for the general partners.

The Department proposes to collect SSNs of the owners of privately owned corporations. Private corporations are those in which the shares or stock are not available for purchase by the general public. In these instances, the Department will collect the SSNs of up to five corporate owners. If there are five or fewer owners, SSNs of all must be provided. If there are more than five owners, SSNs of only the five largest shareholders (owners) are required. Private corporations must also submit their EINs, along with owner SSNs, where applicable.

It is unnecessary for the Department to collect the SSNs of officers of publicly owned corporations, since EINs and other publicly available documents provide an adequate record of Food Stamp Program authorization, firm ownership, and the identities of key individuals involved in firm operations.

Finally, this proposed rule references the sanctions mandated by section 1735 for the willful and unauthorized disclosure of these numbers or receipt of these numbers due to willful solicitation.

The sanctions mandated by section 1735 are those imposed by sections 7213 (a) (1), (2), (3), and (4) of the Internal Revenue Code (26 U.S.C. 7213).

The Department has coordinated the drafting of this proposed rule with both the Internal Revenue Service (Department of the Treasury) and the Department of Health and Human Services, in accordance with the provisions of section 1735.

List of Subjects in 7 CFR Part 278

Administrative practice and procedure, Banks, banking, Claims, Food Stamps, Groceries-retail, Groceries, general line-wholesaler, Penalties.

Accordingly, 7 CFR part 278 is proposed to be amended as follows:

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND INSURED FINANCIAL INSTITUTIONS

1. The authority citation for part 278 continues to read as follows:

Authority: 7 U.S.C. 2011-2031.

3. In § 278.1:

a. Paragraph (b) is amended by redesignating paragraph (b)(5) as paragraph (b)(6), and by adding a new paragraph (b)(5).

b. Paragraph (q) is amended by:

1. Adding the words "Except for employer identification numbers (EINs) and social security numbers (SSNs)," to the beginning of the first sentence.

2. Adding two sentences to the end of the paragraph.

3. Adding paragraphs (q)(1) and (q)(2).

The additions read as follows:

§ 278.1 Approval of retail food stores and wholesale food concerns.

* * * * *

(b) *Determination of Authorization.*

* * *

(5) *Taxpayer identification numbers.* At the time of an initial request for authorization as well as reauthorization, an applicant firm must provide its employer identification number and social security numbers as described below:

(i) *Employer Identification Number.* The firm must provide its employer

identification number (EIN) if one has been assigned to the firm by the Internal Revenue Service. The authority to request EINs and the guidelines for requesting EINs are set forth in section 6109(f) of the Internal Revenue Code of 1986 and Treas. Reg. § 301.6109–2 (26 CFR 301.6109–2).

(ii) *Social Security Number*. In addition to the EIN, the firm must provide the social security numbers (SSNs) of the following individuals:

(A) The SSN of an owner of a sole proprietorship.

(B) The SSNs of general partners of firms which are partnerships.

(C) The SSNs of up to five of the largest shareholders (owners) of privately owned corporations. (For purposes of this section, a privately owned corporation is one which has shares or stock that are not traded on a stock exchange or available for purchase by the general public.)

* * * * *

(q) *Safeguarding privacy*. * * * For safeguards with respect to EINs, see § 278.1(q)(1) below. For safeguards with respect to SSNs, see § 278.1(q)(2) below.

(1) *Employer identification numbers*. (i) The Department may have access to the EINs obtained pursuant to § 278.1(b)(5) only for the purpose of establishing and maintaining a list of the names and EINs of the stores and concerns for use in determining those applicants who previously have been sanctioned or convicted under section 12 or 15 of the Food Stamp Act of 1977 (7 U.S.C. 2021 or 2024). The Department may use this information on sanctions or convictions in administering section 9 of the Food Stamp Act of 1977. See Treas. Reg. § 301.6109–2(b) (26 CFR 301.6109–2(b)).

(ii) The persons permitted access to the EINs obtained pursuant to § 278.1(b)(5) are officers and employees of the United States whose duties or responsibilities require access to the EINs for the administration or enforcement of the Food Stamp Act of 1977. See Treas. Reg. 301.6109–2(c)(1) (26 CFR 301.6109–2(c)(1)).

(iii) The Department shall provide for any additional safeguards that the Secretary of the Treasury determines to be necessary or appropriate to protect the confidentiality of the EINs. The Department may also provide for any additional safeguards to protect the confidentiality of EINs so long as these safeguards are consistent with any safeguards determined by the Secretary of the Treasury to be necessary or appropriate. See Treas. Reg. § 301.6109–2(c)(2) (26 CFR 301.6109–2(c)(2)).

(iv) EINs maintained by the Department pursuant to § 278.1(b)(5) are confidential. Except as provided in § 278.1(q)(1)(ii) above, no officer or employee of the United States who has or had access to any such EIN may disclose that number in any manner. For purposes of this section, the term "officer or employee" includes a former officer or employee. See Treas. Reg. § 301.6109–2(d) (26 CFR 301.6109–2(d)).

(v) Sections 7213(a) (1), (2), and (3) of the Internal Revenue Code of 1986 apply with respect to the unauthorized, willful disclosure to any person of EINs obtained by the Department pursuant to § 278.1(b)(5) in the same manner and to the same extent as sections 7213(a) (1), (2), and (3) apply with respect to unauthorized disclosures of returns and return information described in those sections. Section 7213(a)(4) of the Internal Revenue Code of 1986 applies with respect to the willful offer of any item of material value in exchange for any EIN obtained by the Department pursuant to § 278.1(b)(5) in the same manner and to the same extent as section 7213(a)(4) applies with respect to offers (in exchange for any return or return information) described in that section. See Treas. Reg. § 301.6109–2(e) (26 CFR 301.6109–2(e)).

(2) *Social Security Numbers*. (i) The Department may have access to SSNs obtained pursuant to § 278.1(b)(5) only for the purpose of establishing and maintaining a list of the names and SSNs for use in determining those applicants who previously have been sanctioned or convicted under section 12 or 15 of the Food Stamp Act of 1977 (7 U.S.C. 2021 or 2024). The Department may use this determination of sanctions and convictions in administering section 9 of the Food Stamp Act of 1977.

(ii) The persons permitted access to the SSNs obtained pursuant to § 278.1(b)(5) are officers and employees of the United States whose duties or responsibilities require access to the SSNs for the administration or enforcement of the Food Stamp Act of 1977.

(iii) The Department shall provide for any additional safeguards that the Secretary of Health and Human Services determines to be necessary or appropriate to protect the confidentiality of the SSNs. The Department may also provide for any additional safeguards to protect the confidentiality of SSNs so long as these safeguards are consistent with any safeguards determined by the Secretary of Health and Human Services to be necessary or appropriate.

(iv) The SSNs and related records that are obtained or maintained by authorized persons are confidential, and no officer or employee shall disclose any such SSN or related record except as authorized. The term *related record* means any record, list, or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a request for a SSN is maintained. For purposes of this section, the term *officer or employee* includes a former officer or employee.

(v) The sanctions under sections 7213(a) (1), (2), and (3) of the Internal Revenue Code of 1986 will apply with respect to the unauthorized, willful disclosure to any person of SSNs and related records obtained or maintained in the same manner and to the same extent as sections 7213(a) (1), (2) and (3) apply with respect to unauthorized disclosures of returns and return information described in those sections. The sanction under section 7213(a)(4) of the Internal Revenue Code of 1986 will apply with respect to the willful offer of any item of material value in exchange for any SSN or related record in the same manner and to the same extent as section 7213(a)(4) applies with respect to offers (in exchange for any return or return information) described in that section.

* * * * *

Dated: August 9, 1991.

Betty Jo Nelsen,

Administrator.

[FR Doc. 91–19448 Filed 8–14–91; 8:45 am]
BILLING CODE 3410-30-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 91–NM–126–AD]

Airworthiness Directives; McDonnell Douglas Model DC–10 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to supersede an existing airworthiness directive (AD), applicable to McDonnell Douglas Model DC–10 series airplanes, which currently requires structural inspections, reporting of the inspection results, and repair or replacement, as necessary to ensure continued airworthiness as these airplanes approach the manufacturer's original fatigue design life goal. This action would modify the existing sampling program to: (a) Require additional visual inspections of all Principal Structural

Elements (PSEs) on certain airplanes, (b) include expanded/modified PSEs, (c) revise the reporting requirements, and (d) increase the sample size. This proposal is prompted by new data submitted by the manufacturer indicating that additional inspections and an expanded sample size is necessary to increase the confidence level of the statistical program to ensure timely detection of cracks in PSE's. Such cracking, if not detected and corrected, could result in a compromise of the structural integrity of these airplanes.

DATES: Comments must be received no later than October 1, 1991.

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Transport Airplane Directorate, ANM–103, Attention: Airworthiness Rules Docket No. 91–NM–126–AD, 1601 Lind Avenue SW., Renton, Washington 98055–4056. The applicable service information may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801, Attention: Business Unit Manager, Technical Publications and Technical Administrative Support C1–L5B (54–60). This information may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Ms. Dorenda D. Baker, Aerospace Engineer, Airframe Branch, ANM–121L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach California 90806–2425; telephone (213) 988–5231.

SUPPLEMENTARY INFORMATION: Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments specified above will be considered by the Administrator before taking action on the proposed rule. The proposals contained in this Notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA/public contact, concerned with the substance of this proposal, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this Notice must submit a self-addressed, stamped post card on which the following statement is made: "Comments to Docket Number 91–NM–126–AD." The post card will be date/time stamped and returned to the commenter.

Discussion

On September 13, 1989, the FAA issued AD 89–22–10, Amendment 39–6330 (54 FR 42291, October 16, 1989), applicable to McDonnell Douglas Model DC–10 series airplanes to require structural inspections, and repair or replacement, as necessary to ensure continued airworthiness as these airplanes approach the manufacturer's original fatigue design life goal. That action was prompted by a structural re-evaluation, which identified certain significant structural components to inspect for fatigue cracks. This condition if not corrected, could result in a compromise of the structural integrity of these airplanes.

Since issuance of that AD, the manufacturer has issued McDonnell Douglas Report No. L26–012, DC–10 Supplemental Inspection Document (SID), dated May 1990, to modify the sampling program with additional procedures to:

a. Add visual inspections of all Principal Structural Elements (PSE) on certain airplanes listed in the SID planning data, at least once during the interval between the start date (SDATE) and the end date (EDATE) established for each PSE. (The additional visual inspections, defined in Section 4 of Volume II, are required on airplanes which have not been inspected in accordance with section 2 of Volume II of the SID.)

b. Include expanded/modified PSE's.

c. Use a revised inspection reporting form.

d. Report the results of the new visual inspections in addition to those required by the existing AD.

e. Increase the sample size.

The FAA has reviewed and approved the revised SID and has determined that the additional visual inspections, expanded/modified PSEs, revised reporting requirements, and increased sample size are necessary to provide an acceptable level of confidence that cracks in PSE's do not exist in the fleet.

Since this condition is likely to exist or develop on other airplanes of this same type design, an AD is proposed which would supersede AD 89–22–10 with a new airworthiness directive that would require an additional visual inspection of all airplanes listed in the SID planning data at least once during each inspection interval, and would require the reporting of the results, both positive and negative, in accordance with the revised SID previously described.

There are approximately 423 Model DC–10 series airplanes of the affected design in the worldwide fleet. It is estimated that 252 airplanes of U.S. registry and 10 U.S. operators would be affected by this AD. Incorporation of the Supplemental Inspection Document program into an operator's maintenance program, as originally required by AD 89–22–10, is estimated to necessitate 1,000 manhours (per operator), at an average labor cost of $55 per manhour. Based on these figures, the cost to the 10 affected U.S. operators to initially incorporate the SID program is estimated to be $550,000.

The incorporation of the additional procedures proposed in this AD action would require approximately 250 additional manhours per operator to accomplish, at an average labor cost of $55 per manhour. Based on these figures, the cost to the 10 affected U.S. operators to incorporate the revisions to the SID program is estimated to be $137,500.

The recurring inspection costs, as originally required by AD 89–22–10, is estimated to be 341 manhours per airplane per year. The procedures added to the program by this proposed AD action would require approximately 14 additional manhours per airplane per year to accomplish. The average labor charge would be $55 per manhour. Based on these figures, the recurring inspection total cost impact of the AD on U.S. operators is estimated to be $19,525 per airplane, or $4,920,300 for the affected U.S. fleet.

Based on the above figures, the total cost impact of this AD is estimated to be $5,057,800 for the first year, and $4,920,300 for each year thereafter.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it it determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing Amendment 39–6330 and by adding the following new airworthiness directive:

McDonnell Douglas: Docket No. 91–NM–128–AD. Supersedes AD 89–22–10.

Applicability: Model DC–10 series airplanes, certificated in any category.

Compliance: Required as indicated, unless previously accomplished.

To ensure the continuing structural integrity of these airplanes, accomplish the following:

(a) Within one year after November 20, 1989, (the effective date of AD 89–22–10, Amendment 39–6330), incorporate a revision into the FAA-approved maintenance inspection program which provides for inspection of the Principal Structural Elements (PSE) defined in Section 2 of Volume I of McDonnell Douglas Report No. L26–012, "DC–10 Supplemental Inspection Document (SID)," dated November 1988, in accordance with Section 2 of Volume III of that document. The non-destructive inspection techniques set forth in Volume II of the SID provide acceptable methods for accomplishing the inspections required by this AD. All inspection results, negative or positive, must be reported to McDonnell Douglas, in accordance with the instructions of Section 2 of Volume III of the SID.

(b) Within 6 months after the effective date of this AD, incorporate a revision into the FAA-approved maintenance inspection program which provides for inspection of the Principal Structural Elements (PSE) defined in section 2 of Volume I of McDonnell Douglas Report No. L26–012, "DC–10 Supplemental Inspection Document (SID)," Revision 1, dated May 1990, in accordance with section 2 of Volume III of that document. The non-destructive inspection techniques set forth in sections 2 and section 4 of Volume II of that SID provide acceptable methods for accomplishing the inspections required by this AD. All inspection results, negative or positive, must be reported to McDonnell Douglas, in accordance with the instructions of section 2 of Volume III of that SID. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB Control Number 2120–0056.

(c) Cracked structure detected during the inspections required by paragraph (a) and (b) of this AD must be repaired before further flight, in accordance with a method approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Transport Directorate.

(d) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base in order to comply with the requirements of this AD.

(e) An alternative method of compliance or adjustment of compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate.

Note: The request should be forwarded through an FAA Principal Maintenance Inspector, who may concur or comment and then send it to the Manager, Los Angeles ACO.

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801, Attention: Business Unit Manager, Technical Publications and Technical Administrative Support C1–L5B (54–60). These documents may be examined at the FAA, Northwest Mountain Region, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington; or at the Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

Issued in Renton, Washington, on August 1, 1991.

David G. Hmiel,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 91–19442 Filed 8–14–91; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 9

[Notice No. 722]

RIN 1512–AA07

Santa Lucia Highlands, CA 91F016P

AGENCY: Bureau of Alcohol, Tobacco and Firearms (ATF), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Alcohol, Tobacco and Firearms (ATF), is considering the establishment of a viticultural area located entirely within Monterey County, California to be known as "Santa Lucia Highlands." This proposal is the result of a petition submitted by Mr. Barry Jackson of the Harmony Wine Co.

ATF believes that the establishment of viticultural areas and the subsequent use of viticultural area names as appellations of origin in wine labeling and advertising will help consumers identify the wines they may purchase. The establishment of viticultural areas also allows wineries to specify further the origin of wines they offer for sale to the public.

DATES: Written comments must be received by September 30, 1991.

ADDRESSES: Send written comments to: Chief, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, P.O. Box 50221, Washington, DC 20091–0221 (Notice No. 722). Copies of the petition, the proposed regulations, the appropriate maps, and written comments will be available for public inspection during normal business hours at: ATF Public Reading Room, room 6300, 650 Massachusetts Avenue NW., Washington, DC 20226

FOR FURTHER INFORMATION CONTACT: David W. Brokaw, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue NW., Washington, DC 20226, (202) 566–7626.

SUPPLEMENTARY INFORMATION:

Background

On August 23, 1979, ATF published Treasury Decision ATF–53 (43 FR 37672, 54624) revising regulations in 27 CFR, part 4. These regulations allow the establishment of definite American viticultural areas. The regulations also allow the name of an approved viticultural area to be used as an appellation of origin in the labeling and advertising of wines.

On October 2, 1979, ATF published Treasury Decision ATF–60 (44 FR 56692) which added a new part 9 to 27 CFR, providing for the listing of approved American viticultural areas, the names of which may be used as appellations of origin. Section 4.25a(e)(1), title 27, CFR defines an American viticultural area as a delimited grape-growing region distinguishable by geographical features, the boundaries of which have been delineated in subpart C of part 9. Section 4.25a(e)(2), title 27, CFR, outlines the procedure for proposing an American viticultural area. Any interested person may petition ATF to establish a grape-growing region as a viticultural area. The petition should include:

(a) Evidence that the name of the proposed viticultural area is locally and/or nationally known as referring to the area specified in the petition;

(b) Historical or current evidence that the boundaries of the viticultural area are as specified in the petition;

(c) Evidence relating to the geographical characteristics (climate, soil, elevation, physical features, etc.) which distinguish the viticultural features of the proposed area from surrounding areas;

(d) A description of the specific boundaries of the viticultural area, based on features which can be found on United States Geological Survey (U.S.G.S.) maps of the largest applicable scale; and

(e) A copy or copies of the appropriate U.S.G.S. map(s) with the proposed boundaries prominently marked.

Petition

ATF has received a petition from Mr. Barry Jackson of the Harmony Wine Company proposing a viticultural area in central Monterey County, California, to be known as Santa Lucia Highlands. The proposed area consists of the eastern flank of the Santa Lucia Mountain Range and is located completely within the boundaries of the current Monterey viticultural area. The general boundaries are: Limekiln Creek to the north; the Salinas River and its associated terraces to the east; the western border of the "Arroyo Seco" viticultural area in the Southeast; and the western border of the "Monterey" viticultural area to the west.

The total area of the proposed appellation is approximately 22,000 acres. According to the petitioner, there are currently 1,850 acres committed to active viticulture, with plans underway to plant an additional 400 acres to winegrapes. Commercial viticulture in the proposed area began in the early 1970's. The petitioner states that the following factors differentiate the proposed Santa Lucia Highlands from the adjacent Salinas Valley floor and other viticultural areas in Monterey County: (1) A well defined alluvial terrace running the length of the eastern boundary; (2) Generally cooler microclimate: Cool Region I/II vs. Region II/III; (3) Different soil types: gravelly, sandy loam vs. silty clay loam; (4) Higher elevation: Initially 40 to 120 feet higher than the valley floor and climbing to 1,200 feet above the valley floor; (5) Climate: Less wind and earlier fog burn-off with morning sun and; (6) East facing slopes receiving morning sun first. The principal vineyards in the proposed Santa Lucia Highlands are: Smith & Hook, Paraiso Springs, Sleepy Hollow, IVV, Robert Talbot, Hillside, Doctor's, Lone Oak, La Estancia, La Reina and Vinco.

There are three wineries located within the proposed area: Smith & Hook, Paraiso Springs, and Robert Talbot.

Evidence of Name

Both wine trade and general publications recognize the proposed viticultural area as a grape-growing region. The May, 1990, "Head on Wine" trade publication discusses the 1987 Smith and Hook "Monterey" Merlot, as having been "grown entirely in the Santa Lucia Highlands." An article in the "Vail Trails Daily Options" entitled, "California Wine Comes To Vail," refers to the Smith and Hook Vineyards as "nestled in the Santa Lucia Highlands of central California's Monterey County." The 1990 Orange County Fair and Orange County Wine Society Judges Dinner menu includes Smith and Hook 1987 "Santa Lucia Highlands" Merlot. Additionally, a newspaper article in the "Bakersfield Californian" on May 10, 1990, discussing Smith and Hook, states it to be "the isolated winery located in the Santa Lucia Highlands overlooking Soledad and Salinas Valley."

Geographical Evidence

Topography

The Santa Lucia Highlands comprise the eastern flank of the Santa Lucia Mountains that extend westward to the Pacific Ocean.

The dominant feature of the Santa Lucia Highlands are the alluvial terraces. These terraces are one of the major factors differentiating the "highlands" from the Salinas valley floor. The main terrace formation runs from just southwest of Gonzales to the area due south of Soledad. The most northerly section of the proposed area, from Limekiln Creek to the area near the junction of River Road and Gonzales Road, is characterized by multiple terrace formations.

Climate

Proximity to the Pacific Ocean results in a strong maritime influence on temperature, wind, and fog formation. Examination of the heat summation data provided with the petition shows a generally cooler climate on the west side of the valley.

Precipitation is concentrated in the winter months and averages 10 to 15 inches annually. Due to the maritime influence, fog is a constant feature in the Salinas Valley, particularly during summer months. The fog burns off earlier in the day in the areas above the valley floor. This earlier burn-off results in greater light intensity for a longer period for vineyards located in the highlands.

The north-south orientation of the valley causes cool marine air to be drawn into the valley by warm air rising off the valley floor. The narrow aspect of the valley (approximately 6 miles wide at Gonzales and 3 miles at Soledad) creates somewhat of a wind-tunnel effect. Windspeeds average 5 to 16 miles per hour, but higher velocities are not uncommon, particularly around Soledad where the valley narrows. Windspeeds are highest through the center of the valley and diminish at the valley edges and in the highlands.

Soils

The soil information provided by the petitioner is from the "soil survey of Monterey County, California" issued by the Department of Agriculture Soil Conservation Service, April 18, 1978. The primary soils associated with the alluvial terraces of the Santa Lucia Highlands are the Arroyo Seco and Chualar series. These are well-drained soils formed from granitic alluvium, and in the case of the Chualar series, some schistose rocks on alluvial fans and terraces. These soils are generally loam or gravelly, sandy loam, with an underlying very gravelly material. Permeability is moderately rapid. Roots can penetrate to a depth of sixty inches or more. These soils form slopes of 2 percent to 9 percent on most of the alluvial fans and terraces.

Included in the alluvial fans and terraces are small areas of placentia, Rincon, Tujunga, Lockwood, Gorgonio, and Hanford soils.

The upper slopes of the Santa Lucia Mountains are composed of Cieneba, Sheridan, Vista, Junipero, McCoy, Gazos, Linne, and Santa Lucia-Relize association soils, on slopes of 15 percent to 75 percent grade.

The geology of the Santa Lucia range consists of large masses of granitic and metamorphic rock in the northern section, diatomaceous shale and massive sandstone in the central area, and masses of shale, sandstone, and serpentine to the south.

In contrast, the soils of the valley floor are primarily from the Mocho, Cropley, Pico and Danville series. The Mocho soils of the valley floor are silty clay loams of 0 percent to 2 percent grade. The pico and Danville soils are sandy clay loams of 0 percent to 2 percent grade.

Public Participation—Written Comments

ATF requests comments from all interested persons. Since the U.S.G.S. maps included with the petition show that the proposed area is located on the leeward side of a ridge named "Sierra de Salinas," ATF is particularly interested in receiving comments concerning whether the name "Santa Lucia Highlands" is locally or nationally known as referring to the proposed area.

Comments received on or before the closing date will be carefully considered. Comments received after that date will be given the same consideration if it is practical to do so. However, assurance of consideration can only be given to comments received on or before the closing date.

ATF will not recognize any submitted material as confidential and comments may be disclosed to the public. Any material which the commenter considers to be confidential or inappropriate for disclosure to the public should not be included in the comments. The name of the person submitting a comment is not exempt from disclosure.

Any interested person who desires an opportunity to comment orally at a public hearing on the proposed regulations should submit his or her request, in writing, to the Director within the 45-day comment period. The Director, however, reserves the right to determine, in light of all circumstances, whether a public hearing will be held.

Regulatory Flexibility Act

It is hereby certified that this document will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required because the proposal, if promulgated as a final rule, is not expected (1) to have secondary, or incidental effects on a substantial number of small entities; or (2) to impose, or otherwise cause a significant increase in the reporting, recordkeeping, or other compliance burdens on a substantial number of small entities.

Executive Order 12291

It has been determined that this document is not a major regulation as defined in E.O. 12291 and a regulatory impact analysis is not required because it will not have an annual effect on the economy of $100 million or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographical regions; and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Paperwork Reduction Act

The provisions of the Paperwork Reduction Act of 1980, Public Law 96-511, 44 U.S.C. chapter 35, and its implementing regulations, 5 CFR part 1320, do not apply to this notice because no requirement to collect information is proposed.

Drafting Information

The principal author of this document is David W. Brokaw, Wine and Beer Branch, Bureau of Alcohol, Tobacco and Firearms.

List of Subjects in 27 CFR Part 9

Administrative practice and procedure, Consumer protection, Viticultural areas, Wine.

Authority and Issuance

27 CFR part 9, American Viticultural Areas, is amended as follows:

PART 9—AMERICAN VITICULTURAL AREAS

Paragraph 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Par. 2. Subpart C is amended to add § 9.139 to read as follows:

Subpart C—Approved American Viticultural Areas

§ 9.139 Santa Lucia Highlands.

(a) *Name.* The name of the viticultural area described in this section is "Santa Lucia Highlands."

(b) *Approved maps.* The appropriate maps for determining the boundaries of the "Santa Lucia Highlands" viticultural area are 7 U.S.G.S. Quadrangle 7.5 minute series topographic maps. They are titled:

(1) Chualar, Calif., 1947 (photorevised 1984)

(2) Gonzales, Calif., 1955 (photorevised 1984)

(3) Rana Creek, Calif., 1956 (Photoinspected 1973)

(4) Palo Escrito Peak, Calif., 1956 (photorevised 1984)

(5) Soledad, Calif., 1955 (photorevised 1984)

(6) Sycamore Flat, Calif., 1956 (photorevised 1984)

(7) Paraiso Springs, Calif., 1956 (photorevised 1984)

(c) *Boundaries.* The Santa Lucia Highlands viticultural area is located in Monterey County, California. The beginning point is found on the "Chualar, California" U.S.G.S, map, where Limekiln Creek crosses the 360 foot contour interval. This point also coincides with the western boundary of the Guadalupe Y Llanitos de los Correos Land Grant and the eastern boundary of section 28, T. 16S., R. 4E. The boundary is as follows:

(1) From the beginning point the boundary follows Limekiln Creek for approximately 1.25 miles northeast to the 100 foot elevation.

(2) Then following the 100 foot contour in a southeasterly direction for approximately 1 mile, where the boundary intersects the west bank of the Salinas River.

(3) Then following the west bank of the Salinas River in a southeasterly direction on the Gonzales, California U.S.G.S. map for approximately 2.50 miles to the point on the Palo Escrito Peak, California U.S.G.S. map where the river channel crosses the 120 foot elevation.

(4) Then following the 120 foot elevation due south for approximately 2,200 feet where it climbs to the 160 foot elevation.

(5) Then following the 160 foot elevation in a southeasterly direction for approximately 6.50 miles, to the point where the 160 foot elevation crosses River Road.

(6) Then following River Road in a southeasterly direction for approximately 1 mile to the junction of river, Fort Romie and Foothill Roads.

(7) Then following Foothill Road in a southeasterly direction for approximately 4 miles to the junction of Foothill and Paraiso Roads on the Soledad, California U.S.G.S. map.

(8) Then following Paraiso Road in a southerly direction to the intersection with Clark Road on the Paraiso Springs, California U.S.G.S. map.

(9) Then south for approximately 1.8 miles to the southeast corner of section 32, T. 18S., R. 6E.

(10) Then due west along the southern boundaries of sections 32 and 31, to the southwest corner of section 31, T. 18S., R. 6E.

(11) Then north along the western boundaries of sections 31 and 30, to the northwestern corner of section 30 T. 18S., R. 6E.

(12) Then northwest in a straight diagonal line to the northwest corner of section 24, T. 18S., R. 5E on the Sycamore Flat, California U.S.G.S. map.

(13) Then north along the western boundary of section 13, T. 18S., R. 5E., to the northwestern corner of section 13, T. 18S., R. 5E.

(14) Then northwest in a diagonal line across sections 11 and 3, to the northwest corner of section 3, T. 18S., R. 5E on the Palo Escrito Peak, California U.S.G.S. map.

(15) Then due west along the southern boundary of section 33, T. 17S., R. 5E., to the southwestern corner of section 33, T. 17S., R. 5E.

(16) Then north along the western boundary of section 33 to the southeast corner of section 29, T. 17S., R. 5E.

(17) Then northwest in a diagonal line through sections 29, 19, 13, and 11, to the northwest corner of section 11, T. 17S., R. 4E on the Rana Creek, California U.S.G.S. map.

(18) Then north along the western boundary of section 2, T. 17S., R. 4E., to the northwestern corner of section 2, T. 17S., R. 4E.

(19) Then west along the southern boundary of section 34, T. 16S., R. 4E., to the southwestern corner of section 34, T16S., R4E.

(20) Then north along the eastern boundary of sections 33 and 28, T. 16S., R. 4E., for approximately 1 mile, to the point where the eastern boundary of section 28 T. 16S., R. 4E., coincides with the western boundary of the Guadalupe Y Llanitos de los Correos Land Grant on the Chualar, California U.S.G.S. map.

(21) Then northwest along the grant line for approximately 2,500 feet to the point of beginning on Limekiln Creek.

Signed: August 7, 1991.

Stephen E. Higgins,

Director.

[FR Doc. 91-19444 Filed 8-14-91; 8:45 am]

BILLING CODE 4810-31-M

FEDERAL MARITIME COMMISSION

46 CFR Part 540

[Docket No. 91-32]

Passenger Vessel Financial Responsibility Requirements for Indemnification of Passengers for Nonperformance of Transportation; Advance Notice of Proposed Rulemaking and Notice of Inquiry.

AGENCY: Federal Maritime Commission

ACTION: Advance notice of proposed rulemaking and notice of inquiry.

SUMMARY: The Federal Maritime Commission solicits public comment on its passenger vessel financial responsibility requirements for indemnification of passengers for nonperformance of transportation. The comments received will assist the Commission in determining whether it should amend its regulations at 46 CFR part 540, subpart A. The Federal Maritime Commission also invites the public to comment on the meaning of section 3(b) of Public Law 89-777.

DATES: Comments (original and fifteen copies) on or before September 30, 1991.

ADDRESSES: Send comments to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC (202) 523-5725.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573 (202) 523-5796.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Federal Maritime Commission ("Commission" or "FMC") has determined to institute this proceeding as a step in its evaluation of the recommendations contained in the April 11, 1991, Report to the Commission ("Report") by the Investigative Officer in Fact Finding Investigation No. 19, Passenger Vessel Financial Responsibility Requirements ("FF-19"). The Report enabled the Commission to continue the process begun in the Commission's rulemaking proceeding in Docket No. 90-01, Security for the Protection of the Public, Maximum Required Performance Amount, to determine whether additional or alternate means of regulations would be appropriate in the area of financial responsibility under the provisions of section 3 of Public Law 89-777.

By Order of Investigation issued on August 17, 1990, the Commission instituted FF-19 to collect and analyze information "to establish a sound basis for review of current FMC regulations at 46 CFR part 540, subpart A, on financial responsibility of passenger vessel operators." These rules enforce the statutory mandate of section 3 of Public Law 89-777, which requires evidence of financial responsibility to be filed with the FMC that establishes a passenger vessel operator's ability to indemnify passengers for nonperformance. Such evidence is hereinafter referred to as section 3 coverage. As currently provided in 46 CFR part 540, section 3 coverage may be established by one or a combination of the following methods: insurance, escrow account, guaranty, self-insurance or surety bond.

The Commission's jurisdiction in this regard currently extends to those persons in the United States who arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports.

The Investigative Officer, in his Report, made six recommendations, five of which [1] the Commission seeks comment on:

Recommendation No. 1—Ceiling on Maximum Coverage Required

The Commission should retain the current $15 million ceiling for insurance, escrow, guaranty or surety bonds. Should the Commission feel that some type of coverage above the current ceiling is necessary, two options are suggested:

(1) Allow for self-insurance above the current ceiling, following the changes in Recommendation No. 2; or

(2) adopt a sliding scale applicable to the large passenger vessel operators, taking into account an operator's past performance.

Recommendation No. 2—Liberalize Self-Insurance Requirements

The Commission should liberalize its self-insurance rules. To do so, the Commission should consider the following changes to the regulations.

(1) Repeal the requirement that assets be physically located in the United States so long as the operators submit evidence of the whereabouts of these assets;

(2) Require that passenger vessel operators maintain resident agents capable of receiving subpoenas and other legal documents in the event of litigation;

(3) Require that the countries where these assets are located must not restrict the levying of property as a result of litigation;

(4) Require passenger vessel operators to periodically file financial statements following generally accepted U.S. accounting practices, to allow the Commission to monitor the operator's financial health;

[1] The remaining recommendation concerned the Commission's lack of jurisdiction over the land and air portions of cruise packages, and over foreign-to-foreign cruises. This recommendation need not be included in an advance notice of proposed rulemaking, as the Commission could evaluate the issues within the agency.

(5) Require that a cruise line's cash on hand and in banks be enough to cover unearned passenger revenue and, if there is a gap between this amount and the exposure, then consider a company's net worth, assigning a ratio between the net worth and this gap as a multiple of two.

Recommendation No. 3—Use of a Sliding Scale Formula

The Commission should consider implementing a sliding scale formula which has a high lower-end threshold and gradually rises with higher unearned passenger revenues.

Recommendation No. 4—Factors to be Used in Determining the Amount of Section 3 Coverage

The Commission should consider such items as seasonal variations, past experience, vessel redeployment and other related factors in setting the amount of section 3 coverage. To accomplish this, the Commission could require operators to report their occupancy figures, past history, track record of good performance, and other relevant data on a quarterly basis to allow the Commission to adjust the required coverage; and should consider imposing a filing fee whenever passenger vessel operators request adjustment of their coverage. If the operator is new, the required coverage should be more stringent.

Recommendation No. 6—Review of Regulations to Determine Alternative Standards of Section 3 Coverage

The Commission should review its regulations to promote a realistic use of all the alternatives available to provide evidence of financial responsibility. To do this, the Commission could:

(1) Institute an inquiry to determine alternative methods of providing coverage;

(2) Consider fine-tuning its current regulations so as to provide more realistic alternatives to the industry;

(3) Consider an exemption for those companies which purchased "whole ship" contracts.

II. Discussion

A. Ceiling on Maximum Coverage Required

With respect to the maximum coverage required, the Commission seeks comment on several issues. In Docket No. 90–01, the Commission amended its regulation that specified a maximum amount of coverage for insurance, escrow, guaranty or surety bond required of passenger vessel operators as evidence of financial responsibility for indemnification of passengers for nonperformance. The amendment raised the ceiling required in 46 CFR 540.9(j) from $10 million to $15 million. The Commission deemed the amendment necessary because of the widening gap between unearned passenger revenues of some operators and the then-$10 million ceiling, and because of inflationary trends which continue to exert pressure on the price of passenger fares. The Investigative Officer, upon an analysis of the record in FF–19 with respect to the ceiling, recommended that the $15 million ceiling for insurance, escrow, guaranty or surety bonds be retained, or, should the Commission determine that some coverage above the ceiling be necessary, recommended allowing for liberalized self-insurance above the ceiling (see further discussion of liberalized self-insurance below) or the adoption of a sliding scale applicable to the large passenger vessel operators, taking into account an operator's past performance.

The Commission has determined, in order to obtain a full range of comments, to widen the scope of this issue to include comment on the appropriateness of lowering the current ceiling.

The Commission solicits comments on the following issues relating to the ceiling on maximum coverage required:

1. Is the current ceiling of $15 million adequate, and should it be retained?

2. In the event that the Commission determines that the current ceiling is inadequate, i.e., that additional coverage above the ceiling is necessary, please comment on the adequacy of either of the alternatives proposed by the Investigative Officer to provide additional coverage above the current ceiling and/or provide another alternative. What would be the impact on passenger vessel operators and on the passenger public should the Commission propose a rule to require additional coverage above the current ceiling?

3. Should the Commission consider lowering the current ceiling of $15 million? If so, at what dollar amount would the ceiling be adequate to protect the shipping public? Why? What would be the impact on passenger vessel operators and on the passenger public should the Commission lower the current ceiling?

B. Liberalize the Self-Insurance Requirements

There are several areas that concern the liberalization of the Commission's self-insurance regulations upon which the Commission is seeking comment. Two of these areas are: repealing the requirement that assets be located in the United States (see previous discussion of Recommendation No. 2), and changing the requirement that net worth and working capital both be sufficient to cover any unearned passenger revenue exposure (providing instead that any gap between a company's cash on hand/in banks and the unearned passenger vessel revenue exposure be covered by its net worth at twice the value of the exposure gap). In connection with the assets-in-theU.S. issue, the Commission also has determined to seek comment on the viability of allowing passenger vessel operators to use their vessels as U.S. assets while in U.S. ports.

These suggestions require the Commission to reexamine long-standing Commission policy. Commission regulations at 46 CFR 540.9(d) currently require that any securities or assets accepted by the Commission as evidence of financial responsibility must be physically located in the United States. This applies to guarantors, insurers, escrow agents, and surety companies, in addition to those wishing to qualify as self-insurers. The Commission has historically required the maintenance of assets in the U.S. so there would be assets available to passengers obtaining judgments in the event a carrier does not perform.

In order for the Commission to evaluate the viability of the assets-in-the-U.S. requirement for self-insurers, and in order to ascertain the best way to determine how net worth and working capital should be considered when determining how an operator may qualify as a self-insurer, the Commission seeks comments on the following questions:

4. It has been suggested that the Commission liberalize its self-insurance regulations. If it does so, how may this best be accomplished? Include in your comments (but do not limit your comments to these points): What standards and safeguards should be developed to ensure that assets held outside of the U.S. would be attachable; what is an appropriate formula for calculating the net worth required to cover the exposure gap between unearned passenger vessel revenue and a company's cash on hand/in banks; what additional reporting requirements should be imposed to ensure that the Commission understands the complete financial structure and status of an operator, including an operator which is a corporate subsidiary?

5. It has been suggested that the Commission allow passenger vessel operators to use their vessels as U.S. assets while in U.S. ports. Is this feasible? What impact would this have

on a passenger vessel operator's decision to try to qualify as a self-insurer? In what ways might this suggestion best be accomplished? What issues must the Commission resolve should it wish to effect such a change in its regulations? Will the public be protected in the case of carrier nonperformance, i.e., is there any potential for abuse? How can the regulations be crafted to keep a vessel in a U.S. port when the operator is in a financial situation which could trigger nonperformance?

6. What would be the impact on the passenger public should the Commission liberalize its self-insurance rules, including the potential costs to the passenger public for obtaining judgments when assets are held outside of the United States?

C. Use of a Sliding Scale to Determine the Amount of Section 3 Coverage

It has been proposed that the Commission use a sliding scale to determine the amount of section 3 coverage required. One proposal is to replace the current method of computing section 3 coverage (110% of the highest month's unearned passenger revenue over the last two years for certificants; 110% of anticipated highest month's unearned passenger revenue for new applicants) with a sliding scale formula. The following proposed formula was submitted by a participant in FF-19:

Category	Required coverage
Unearned revenue of $0–$5,000,000.	100% of unearned revenue up to $5,000,000.
Unearned revenue of $5,000,000–$15,000,000.	$5,000,000 plus 50% of excess unearned revenue over $5,000,000 subject to an overall maximum of $5,000,000 per vessel.
Unearned revenue of $15,000,000–$35,000,000.	$10,000,000 plus 25% of excess unearned revenue over $15,000,000 subject to an overall maximum of $5,000,000 per vessel and a $15,000,000 overall maximum.
Unearned revenue over $35,000,000.	$15,000,000 overall maximum.

For an applicant with no previous history as a certificant, the sliding scale would be used prospectively, as coverage is currently calculated. For certificants, or applicants with previous history as certificants, certain factors would be worked into the sliding scale formula to allow for adjustment downward of required coverage.

The following are factors which could be considered in developing a sliding scale formula, although they are not all-inclusive: Seasonal variations; past experience; vessel redeployments; track record of good performance.

The suggested factors and the sliding scale give rise to the following issues upon which the Commission seeks comment:

7. Should a sliding scale formula be utilized to determine section 3 coverage rather than the current method of determining section 3 coverage?

8. Please comment specifically on the above proposed formula. Is an amended or different formula preferable?

9. Should the Commission adopt factor-based adjustments to a sliding scale formula? If not, why not? If so, what factors should be considered and how should they be considered?

10. It has been suggested that to accomplish a factor-based sliding scale formula, passenger vessel operators should report quarterly, with imposition of a fee for calculation of adjusted coverage. Comments are requested on the efficacy of quarterly vis-a-vis other reporting periods, and the potential additional workload such reporting would impose on certificants.

11. What would be the impact of potentially reduced required coverage with respect to the adequacy of the protection of the public?

D. The Flexibility of Current Regulations and Alternate Standards for Determining Financial Responsibility

The Commission wishes to obtain comments on the flexibility of its current regulations and wishes to examine alternate standards of coverage in an effort to fin-tune the Commission's regulations with respect to section 3 coverage.

The Report pointed out the relatively high percentage of passenger vessel certificants which qualified based on guaranties, and the fact that several options available for section 3 coverage are little-used. The Investigative Officer concluded that, in spite of the wide variety of methods theoretically available to the industry to qualify, the industry is not taking advantage of them, for various reasons. Industry participants in the fact finding process asked the Commission to consider modifications to the current options, in order to provide flexibility in meeting Commission requirements. These modifications could have the effect of lessening the financial burden on the industry and potentially reducing the amount of financial responsibility coverage available to the public. The record suggests, however, that the industry has not yet fully explored the flexibility available within the current regulatory scheme to provide a combination of evidences of financial responsibility to meet the required coverage. Rather, it appears that the industry traditionally has been focusing on a single method of coverage to provide evidence of financial responsibility, e.g., providing a guaranty or a surety bond for the full amount of necessary coverage.

Currently, Commission regulations implementing section 3 of Public Law 89–777 allow for five acceptable methods of providing evidence of adequate financial responsibility: insurance, escrow account, guaranty, self-insurance, or surety bond. Evidence may be established by one or a combination of such methods. See 46 CFR 540.5. Also, within the self-insurance option, the Commission regulations provide that, while working capital and net worth are to be considered in determining qualification as a self-insurer, the Commission may waive the requirement as to the amount of working capital for good cause shown (46 CFR 540.5(d)). Further, 46 CFR 540.5(c) and 46 CFR 540.6(a) allow the required format of the guaranty and the surety bond respectively to be amended by the Commission in a particular case for good cause.

Escrow accounts, by their nature, are unique documents customized to fit particular circumstances, which are submitted to the Commission for approval prior to acceptance as evidence of financial responsibility. Thus, there is a high degree of flexibility extant within current regulatory parameters for a passenger vessel operator to "customize" coverage, should that be necessary. For example, a certificant seeking to lower costs associated with its current required coverage of $7 million might explore the option of reducing its surety bond coverage from $7 million to $5 million and qualifying as a self-insurer for the remaining $2 million; the potential savings regarding the bond coverage might compensate for the increased reporting requirements for self-insurance.

The Commission also has determined to explore the issue of the establishment of alternate standards for financial responsibility. Section 3(a) of Public Law 89–777 provides, in pertinent part, that persons must file with the Commission "such information as the Commission may deem necessary to establish financial responsibility, * * * or in lieu thereof a copy of a bond or other security * * *" to qualify for a Certificate (Performance). In its regulations at 46 CFR part 540, subpart A, the Commission specifies the methods for establishment of financial

security (see previous paragraph). The issue is whether the Commission may define a standard for "financial responsibility" other than that which exists in its current regulations.

In order to evaluate the flexibility of the relevant current Commission regulations, and to create a public record on alternate standards for financial responsibility, the Commission requests comment on the following issues:

12. Is the flexibility provided in the Commission's current regulations adequate to allow for creative ways to provide evidence of financial responsibility? Why has the passenger vessel industry not taken advantage of the flexibility of the current regulations? If the flexibility in the current regulations is not adequate, why not?

13. Should the Commission develop alternative methodologies for passenger vessel operators to establish their financial responsibility through self-insurance—for example, through the use of: (a) Operating ratios; (b) the relationship of net worth to unearned passenger revenue; (c) the difference between unearned passenger revenue and cash reserves; (d) any other methodology that commenters believe to be appropriate? Please provide specific examples and formulas. What would be the best method to effect this alternative, i.e., what financial records should be submitted to the Commission, how often, how can the Commission guaranty that the passenger public has immediate access to recovery of funds in the event of nonperformance, etc.? These standards and submissions should be sophisticated enough to allow for decision-making, but should be as succinct and straightforward as practical, keeping in mind the Commission's limited staff resources for the passenger vessel program.

The Commission also wishes to consider a "whole ship" contract exemption with respect to section 3 coverage. Under the "whole ship" contract exemption concept, a corporate sponsor purchases all of the passenger accommodations on a ship, and distributes accommodations as incentive awards or uses them for business meetings without charge. Such sales would not be considered as unearned passenger revenue under the exemption. In order to evaluate the "whole ship" contract exemption, the Commission requests comment on the following questions:

14. Should unearned revenue from "whole ship" contracts be exempt from calculation in determining section 3 coverage, i.e., should it be excluded from unearned passenger revenue? If so, why, and how should the Commission's regulations be amended to effect such a change? If unearned revenue from "whole ship" contracts should continue to be considered unearned passenger revenue, why?

15. Does current industry practice allow for other ways to handle unearned revenue from "whole ship" contracts which effectively remove such revenues from consideration as unearned passenger revenue, and what are they?

The issues above arose from the recommendations which came out of FF-19 and the subsequent consideration of same by the Commission. The Commission also takes this opportunity to solicit comment on an issue that either now or at some point in the future may require legislative or administrative clarification. By addressing the following issue in this Advance Notice of Proposed Rulemaking and Notice of Inquiry, the Commission intends to provide a forum to the industry and the public in order to develop a public record upon which to base such review.

Section 3(b) of Public Law 89-777 states, inter alia: "If a bond is filed with the Commission, such bond * * * shall be in an amount paid equal to the estimated total revenue for the particular transportation." The legislative history of Public Law 89-777 contains no discussion on, or explanation of, this provision in the text of section 3(b). Therefore, the Congressional intention on this point is unclear.[8]

The Commission's implementing regulations, at 46 CFR 540.9(j), provide that the amount of a surety bond "shall not be required to exceed 15 million dollars (U.S.)." The cap of $15 million need not be exceeded, regardless of the amount of unearned passenger revenue held by a passenger vessel operator. There is nothing in the Commission's rulemaking proceedings which sheds light on the seeming discrepancy with respect to the language of section 3(b).

Therefore, the Commission seeks comment on the following question:

16. What is the interpretation to be given to the statutory provision at section 3(b) of Public Law 89-777 which states, inter alia: "If a bond is filed with the Commission, such bond * * * shall be in an amount paid equal to the estimated total revenue for the particular transportation" as it relates to the provisions of 46 CFR 540.9(j)?

III. Conclusion

The issues discussed above are significant and complex. In order to provide the Commission with the most complete information available and enable it to make an informed judgment in these matters, interested persons are invited to comment on the specific issues listed above. Commenters are requested to refer to the item numbers when discussing the various issues. Commenters may suggest alternative approaches to the issues presented. All comments or suggested alternatives should, where appropriate, be accompanied by draft language which might become part of a proposed rulemaking. Should the Commission determine to propose any modifications to 46 CFR part 540, subpart A after receiving comments, it will do so by a separate rulemaking proceeding.

Finally, the Commission would remind the passenger vessel industry that it is incumbent on the industry to demonstrate that any changes in the regulatory scheme which it is advocating would not result in a failure to provide the statutorily required protection to the passenger public.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 91-19397 Filed 8-14-91; 8:45 am]

BILLING CODE 6730-01-M

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[8] Some of the passenger vessel operators commenting in Docket No. 90-01, Security for Protection of the Public Maximum Required Performance Amount, argued that the Commission's proposal to abolish the bonding ceiling was inconsistent with the legislative intent of Public Law 89-777. They argued that the legislative history evidences an intent to impose reasonable financial responsibility requirements which would not overburden the "regular liner passenger operators." They particularly noted the written testimony of then Commission Chairman Harllee, much of which was incorporated verbatim into the Congressional reports on the bills. However, the "sliding scale" financial responsibility provisions of the statute and his testimony focused on the "smaller, less substantial vessel operators" rather than the larger, well-established lines as they relate to section 2, the casualty provisions, not section 3, the nonperformance provisions, and so provide no guidance in this instance.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 91-224; RM-7756]

Radio Broadcasting Services; Americus, GA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition by Sumter Broadcasting Co., Inc., proposing the substitution of Channel 254C3 for Channel 254A at Americus, Georgia, and

modification of its license for Station WPUR (FM) to specify the higher class channel. Channel 254C3 can be allotted to Americus in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. The coordinates are North Latitude 32–04–51 and West Longitude 84–15–20. In accordance with § 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest or require the petitioner to demonstrate the availability of an additional equivalent channel for use by interested parties.

DATES: Comments must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Roy F. Perkins, Jr., 1724 Whitewood Lane, Herndon, Virginia 22070 (Attorney for petitioner).

FOR FURTHER INFORMATION CONTACT: Nancy J. Walls, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 91–224, adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocation Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–19435 Filed 8–14–91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91–223, RM–7758]

Radio Broadcasting Services; Rozel, KS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Lee E. Scott proposing the substitution of Channel 254C1 for Channel 254A, Rozel, Kansas, and modification of the construction permit for Station KGZE to specify the higher class channel. The coordinates for Channel 254C1 are 38–20–00 and 99–40–00. We shall propose to modify the construction permit for station KGZE in accordance with § 1.420(g) of the Commission's Rules and will not accept competing expressions of interest for use of the channel or require petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

DATES: Comments must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Lee E. Scott, Box 125, Rozel, Kansas 67574.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 91–223, adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, 1714 21st Street, NW., Washington, DC 20036, (202) 452–1422.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocation Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–19433 Filed 8–14–91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91–225, RM–7759]

Radio Broadcasting Services; Crosby, MN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by First Radio Station of Crosby, Inc., proposing the substitution of Channel 268C3 for Channel 269A, Crosby, Minnesota, and modification of the construction permit for Station KTCF-FM to specify operation on Channel 268C3. Canadian concurrence will be requested for this allotment at coordinates 46–33–09 and 93–57–16. In accordance with § 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Crosby or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

DATES: Commerce must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve petitioner's counsel as follows: Robert J. Rini, Stephen E. Coran, Brown, Finn & Nietert, Chartered, 1920 N Street, NW., suite 660, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 91-225 adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, 1714 21st Street, NW., Washington, DC 20036, (202) 452-1422.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19436 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91-229, RM-7761]

Radio Broadcasting Services; Potosi and Waynesville, MO

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Prime Time Radio proposing the substitution of Channel 249C3 for Channel 249A, Potosi, Missouri, and modification of the construction permit for Station KWVB, to specify operation on Channel 249C3. The coordinates for Channel 249C3 are 37-52-51 and 90-47-01. To accommodate the upgrade at Potosi, we shall propose the substitution of Channel 250A for Channel 249A, Waynesville, Missouri, and modification of the license for station KFBD-FM accordingly. The coordinates for Channel 250A at Waynesville are 37-49-42 and 92-10-27. In accordance with § 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Potosi or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

DATES: Comments must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Kenneth W. Kuenzie, General Partner, Prime Time Radio, Station KWVB, 102 Elm Street, suite 203, Washington, Missouri 63090.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 91-229, adopted July 29, 1991, and released August 9, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, Downtown Copy Center, 1714 21st Street, NW., Washington, DC 20036, (202) 452-1422.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91-19430 Filed 8-14-91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91-222-RM-7204]

Radio Broadcasting Services; Crane, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition by Albert L. Crain seeking the substitution of Channel 267C1 for Channel 265A at Crane, Texas, and the modification of his construction permit for Station KAIR(FM) to specify operation on the higher powered channel. Channel 267C1 can be allotted to Crane in compliance with the Commission's minimum distance separation requirements at the site specified in Station KAIR(FM)'s construction permit. Since Crane is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been requested. The coordinates for Channel 267C1 at Crane are North Latitude 31-21-56 and West Longitude 102-20-22. In accordance with § 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 267C1 at Crane or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

DATES: Comments must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner and its consultant, as follows: Albert L. Crain, Route 6, Box 250, Byhalia, Mississippi 38611 (Petitioner) and Robert A. Lynch, Independent Broadcast Consultants, Inc., 110 County Road 146, RFD# 1, Box# 312, Trumansburg, New York 14886 (Engineering consultant).

FOR FURTHER INFORMATION CONTACT: Pamela Blumenthal, Mass Media Bureau, (202) 654-6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 91-222, adopted July 22, 1991, and released August 8, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 19191 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy

Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–19431 Filed 8–14–91; 8:45 am]

BILLING CODE 6712-01-M

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47 CFR Part 73

[MM Docket No. 91–230, RM–7753]

Radio Broadcasting Services; Graham, WA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition by Brian J. Lord, d/b/a Skywave Broadcasting Company, proposing the allotment of Channel 285A at Graham, Washington, as its first local aural transmission service. Channel 285A can be allotted to Graham in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.3 kilometers (9.5 miles) south to avoid short-spacings to the construction permits for Station KSSY, Channel 285C2, Wenatchee, Washington, and Station KCMS, Channel 287C, Edmonds, Washington. The coordinates for Channel 285A at Graham are North Latitude 46–54–56 and West Longitude 122–14–32. Since Graham is located within 320 kilometers of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

DATES: Comments must be filed on or before September 30, 1991, and reply comments on or before October 15, 1991.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Brian J. Lord, Skywave Broadcasting Company, 1313 SE 208th Street, Kent, Washington 98042 (Petitioner).

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 91–230, adopted July 29, 1991, and released August 9, 1991. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Downtown Copy Center, (202) 452–1422, 1714 21st Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Andrew J. Rhodes,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 91–19429 Filed 8–14–91; 8:45 am]

BILLING CODE 6712-01-M

INTERSTATE COMMERCE COMMISSION

49 CFR Chapter X

[Ex Parte No. 202]

Transition to the Metric System

AGENCY: Interstate Commerce Commission.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Commission solicits comments on establishing policy and administrative procedures to pursue and promote the orderly conversion to the metric system in accordance with the policy of the Metric Conversion Act of 1975 as amended by section 5164 of the Omnibus Trade and Competitiveness Act of 1988. This action would involve the setting of timetables for the conversion process for ICC publications and data reporting, tariff and contract rate filings, manuals and reports, rulemakings and formal dockets, and procurement and administrative programs. It would implement legislation approved in 1988.

DATES: Comments are due on or before September 16, 1991.

ADDRESSES: An original and 10 copies of all comments must be sent to: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

FOR FURTHER INFORMATION CONTACT: Lee Gardner (202) 275–7692 [TDD for hearing impaired: (202) 275–1721].

SUPPLEMENTARY INFORMATION: Section 5164 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418, 102 Stat. 1107, 1451) which amended the voluntary metric conversion provisions of the Metric Conversion Act of 1975 (Pub. L. 94–168, 89 Stat. 1007), declares the policy of the United States to designate the metric system of weights and measurement as the preferred system for United States trade and commerce. The Act provides that each executive Federal agency, by date certain prior to the end of fiscal year 1992, shall use the metric system in its procurements, grants, and other business-related activities except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to United States firms. Executive agencies are required to report to Congress as part of annual budget submissions for each fiscal year actions taken to implement provisions of section 5164.

The U.S. Department of Commerce (DOC) has been designated as the lead Federal agency for metric conversion. DOC issued its guidance for Federal agencies on January 2, 1991, at 56 FR 160 (15 CFR part 19), and on December 20, 1990 issued its interpretation of the International System of Units for the United States at 55 FR 55242. Essentially, Federal agencies are required to: (1) Establish metric conversion plans and dates for use of the metric system in procurements, grants, and other business-related activities; (2) coordinate with other Federal agencies, State and local governments and the private sector; (3) assist in the removal of barriers to metric system transition; and (4) provide

for full public involvement and timely information about significant metrication policies, programs, and actions.

Further, DOC guidance calls for Federal agencies to give consideration to the effects of their actions on State and local governments and the private sector, with particular attention to the effects on small business.

Purpose

Although the Metric Conversion Act, by its terms, only applies to executive agencies, we are considering, where possible and not unduly burdensome, whether to convert to the metric system to achieve a uniform scheme of Federal regulation consistent with our mandate to foster sound economic conditions in transportation. 49 U.S.C. 10101(a)(1)(c) and 10101a(4). The purpose of this ANPR is to solicit comments and suggestions on how the Commission should proceed in defining the scope of its activities subject to metric conversion and to seek guidance on the appropriate timetable for the conversion process.

Areas of Inquiry

Scope of the Conversion Process

From all indications, metric conversion for most ICC programs and activities, including tariffs, contracts, report filing, data collection, and evidence submissions, appears to be desirable. Comments are sought on the scope of metric conversion and whether particular items should be exempted on the grounds that conversion would be unduly burdensome, impractical, or lead to inefficiencies or loss of markets to United States firms (see 15 U.S.C. 205b(2) and 49 U.S.C. 10101a(14) and 11166). Also, we invite comments on whether carriers should be required to file new tariffs and whether existing rail line markers need to be converted.

Timing

According to DOC guidance, the 1992 deadline for metric conversion means that plans scheduling such conversion should be in place by then, with some conversion underway and other conversion schedules as appropriate for later dates. Therefore, the Commission seeks comments on when conversion should take place considering that the Commission is not strictly bound by the Metric Conversion Act or DOC's implementing guidelines. Should conversion be done as of a date certain, or should it be a phased process? What should be the timing of the phase-in, if any? Should dual reporting, i.e., reporting data in metric and English units, be required or permitted during the phase in? How long should that period be? Should the Commission attempt to coordinate conversion to coincide with other Federal agencies such as the Federal Railroad Administration and the Federal Highway Administration?

Standards

Standards for the metric system were established in 1960 by the General Conference of Weights and Measures. This conference established the International Systems of Units (SI) which have been modified periodically for the United States by the Department of Commerce. Should this be the standard used by the Commission? If not, what standard should be used? Should rounding be permitted? If so, under what circumstances and what level of rounding is appropriate? How can standards be enforced?

Forms

Several issues regarding forms used by the ICC as part of the application or reporting process need to be addressed. Since there are many forms that potentially will be converted, the key issue is whether OMB approval for changes in the forms should be sought as of a date certain or as the forms expire? If as of the expiration date, how would other reporting be affected?

Rulemaking

Should the Commission address the conversion to metric in a single rulemaking or should separate rulemakings be used for different categories of actions, e.g., tariffs and contracts, data reporting, and forms? If separate rulemakings are used, should different conversion dates be permitted? Would a single rulemaking be unwieldy?

Education

How can the Commission assist in educating carriers, shippers, and the public in the use of the metric system?

This action will not significantly affect either the quality of human environment or conservation of energy resources.

Authority: 15 U.S.C. 205B; 49 U.S.C. 10321(a), 11142, 11144, 11145, and 11163; and 5 U.S.C. 553 and 559.

Decided: August 7, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 91-19467 Filed 8-14-91; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[Docket No. RAR-4, Notice No. 3]

Railroad Accident Reporting; Open Meeting

AGENCY: Federal Railroad Administration, Department of Transportation.

ACTION: Notice of open meeting.

SUMMARY: On March 14, 1990, the Federal Railroad Administration (FRA) issued an advance notice of proposed rulemaking (ANPRM) soliciting comments and suggestions from the public regarding methods of improving FRA's injury and accident reporting system and its governing regulations (55 FR 9469). The responses to that public notice have provided additional information and identified further issues or subissues related to the issues discussed in the ANPRM. In order to explore matters related to the accident/incident reporting system, FRA held an informal, open meeting on June 13, 1991, in Washington, DC, with members of the Association of American Railroads (AAR) Uniformity Committee. To continue this dialogue, FRA will hold another informal open meeting on August 21, 1991, in Washington, DC, with members of the AAR Uniformity Committee. The meeting will be open to any interested person who wishes to attend as an observer. FRA may schedule additional, informal meetings to the extent that interest is expressed by other parties.

DATES: The open meeting will be held on Wednesday, August 21, 1991 at 8:30 a.m.

ADDRESSES: The open meeting will be held in room 4338, Nassif Building, 400 Seventh Street SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Principal Program Person: Stan Ellis, Office of Safety, FRA, Washington, DC 20590. Telephone: (202) 366-2760 (FTS 366-2760). Principal Attorney: Billie Stultz, Office of the Chief Counsel, FRA, Washington, DC 20590. Telephone: (202) 366-0635 (FTS 366-0635).

SUPPLEMENTARY INFORMATION: On March 14, 1990, FRA issued an ANPRM requesting comments and suggestions on how to improve all aspects of its accident/incident reporting system and the requirements in part 225 (49 CFR part 225). Interested parties were invited to participate in a public hearing on May

17, 1990, and to file written comments prior to May 25, 1990.

The written comments received by FRA provided additional information and raised further issues and subissues related to the matters discussed in the ANPRM. In addition, FRA received significant oral comments on same subject. Representatives of the railroads participating in the AAR Uniformity Committee expressed an interest in exploring possibilities concerning the format in which accident/incident data is gathered pursuant to the FRA Guide for Preparing Accident/Incident Reports. Since these issues bore on regulatory obligations and might touch on issues within the scope of the advance notice, FRA determined that the meeting should be open to any interested person who wishes to observe. (FRA would endeavor to favorably entertain requests for additional meetings of this type from other interested parties.)

Consequently, FRA held an open meeting on these matters with members of the AAR Uniformity Committee on June 13, 1991.

At their request, FRA has scheduled a second open meeting with members of the AAR Uniformity Committee, to continue discussion of these matters. This open meeting will be held Wednesday, August 21, 1991, beginning at 9:30 a.m., in room 4338 of the Nassif Building, 400 Seventh Street, SW., Washington, DC.

Issued in Washington, DC, on August 9, 1991.

Philip Olekszyk,

Deputy Associate Administrator for Safety.

[FR Doc. 91-19437 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-06-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Chapter VI

Receipt of a Petition for Rulemaking: Project Reefkeeper

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Notice of receipt of petition for rulemaking and request for comments.

SUMMARY: NOAA announces receipt of a petition for emergency rulemaking or fishery management plan action under the Magnuson Fishery Conservation and Management Act (Magnuson Act). Project Reefkeeper has petitioned the U.S. Department of Commerce to promulgate a rule to prohibit the taking and landing of live rock within the agency's jurisdiction for the South Atlantic, Caribbean, and Gulf of Mexico. The petitioner has not submitted a proposed rule with its request.

DATES: Comments will be accepted through September 30, 1991.

ADDRESSES: Copies of the petition are available and may be obtained by contacting B. Michael McLemore, Attorney Advisor, Office of General Counsel, NOAA, 9450 Koger Boulevard, suite 116, St. Petersburg, FL 33702; telephone (813) 893-3617. Comments on the need for such a regulation, its objectives, alternative approaches, and any other comments may be addressed to Dr. William W. Fox, Jr., Assistant Administrator for Fisheries, NOAA, NMFS, Silver Spring Metro Center #1, 1335 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: B. Michael McLemore, 813-893-3617.

SUPPLEMENTARY INFORMATION: Live Rock, as defined in the petition for rulemaking, is a broad term used by the marine life collection industry to describe several types of substrate colonized by marine organisms. Four main types of live rock are distinguished: (1) Rubble Rock—Also called base rock, "possesses very little life" but is desirable for the "borers" living in the rock and as a substrate "base" in aquaria. Rubble rock is collected from mounds in shallow water in back-reef locations. (2) Algae Rock—also called plant rock, is colonized chiefly by algae, secondarily by feather duster worms and other invertebrates. Algae rock is collected from rubble areas in the back reef and from inshore areas on both the Atlantic and Gulf sides of the Keys. (3) False Coral—Also called anemone rock, is covered with anemones in the genera *Ricordea* and *Rhodactis*, which are accompanied by encrusting gorgonians, chicken liver sponges, other invertebrates, and algae. False coral occurs in patch reef areas and in other reef habitats. (4) Sea Mat—Also called gravel rock, is colonized almost exclusively by anemone-like organisms, usually of the genus *Zoanthus*, and is principally collected from dredged rock jetties.

Comments received will be considered by NMFS in determining whether to proceed with the development of regulations suggested by the petition. Upon determining whether to open the rulemaking suggested by this petition, the Assistant Administrator will publish a notice of the agency's decision or action in the Federal Register.

Dated: August 8, 1991.

William W. Fox, Jr.,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 91-19350 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-22-M

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50 CFR Part 216

[Docket No. 90880-1162]

RIN 0648-AD02

Depletion of the Coastal-Migratory Stock of Bottlenose Dolphins in the U.S. Mid-Atlantic

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS proposed to designate the coastal-migratory stock of bottlenose dolphins along U.S. mid-Atlantic coast as depleted under the Marine Mammal protection Act (MMPA). This action is required by the MMPA when a species or population stock falls below its optimum sustainable (OSP). Since this stock declined by more than 50 percent as a result of a die-off that occurred during 1987-88, it is believed to be below a level that can maintain maximum net productivity, which is the lower bound of the OSP range. If this population stock is designated as depleted, the MMPA requires the application of certain additional restrictions on taking and importation, and the preparation and implementation of a conservation plan to restore the stock to its OSP.

DATES: Comments must be submitted on or before September 30, 1991.

ADDRESSES: Comments should be addressed to Dr. Nancy Foster, Director, Office of Protected Resources (F/PR), 1335 East-West Hwy., Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Dean Wilkinson, Permits Division Office of Protected Resources, 301-427-2322.

SUPPLEMENTARY INFORMATION:

Background

During 1987-88, an unusually large number of Atlantic bottlenose dolphins (*Tursiops truncatus*) were found dead and washed ashore along the U.S. east coast from New Jersey to central Florida. There was a degree of uncertainty in the estimated magnitude of the reduction in the dolphin stock due to a lack of data and imprecision in estimates of natural mortality. However, on the basis of the best available information, NMFS concluded that the

coastal-migratory stock of bottlenose dolphins along the mid-Atlantic coast probably declined by more than 50 percent as a result of the die-off.

The MMPA states that marine mammal species and population stocks should not be permitted to diminish below their OSP. NMFS has defined OSP, in 50 CFR 216.3, as a range of population levels from the largest supportable within the ecosystem (carrying capacity) to the population level that results in maximum net productivity (MNP). MNP is the greatest net annual increment in population numbers resulting from additions to the population due to reproduction and growth, less losses due to natural mortality. MNP is often represented as a percentage of carrying capacity. For example, in northern fur seals MNP occurs when the population is at about 60 percent of its carrying capacity. In general, populations of large mammals appear to grow most rapidly when at numbers greater than 50 percent of carrying capacity.

By analogy with other large mammal populations, the population level expected to result in MNP for bottlenose dolphins is greater than 50 percent of carrying capacity. However, because of uncertainties regarding abundance estimates, carrying capacity has not been estimated for Atlantic or Gulf stocks of this species. Assuming a reduction of greater than 50 percent in the population due to the die-off and a stable but unknown carrying capacity, NMFS believes that this stock is likely to be below OSP and, thus, depleted under the MMPA.

NMFS published an advance notice of proposed rulemaking (ANPR) (54 FR 41654, October 11, 1989) that incorporated the "call for assistance" required by section 115(a)(2) of the MMPA and a summary of a 1988 status report on this stock. This information will not be repeated here. Based on a review of pubic comments received on the ANPA and a recent review of the status of this stock, NMFS concludes that it is probably below OSP and a depletion designation is appropriate.

Comments on the ANPR were received from the following groups: Marine Mammal Commission, Marine Mammal Coalition, Greenpeace USA.

The Marine Mammal Commission (Commission) Commented that:

(A)vailable information does suggest that the nearshore stock of bottlenose dolphins along the mid-Atlantic states may have been reduced by fifty percent,or more and this qualifies the stock for designation as "depleted" under the (MMPA). The Commission therefore recommends that the Service develop a conservation plan for the stock as soon as possible, but before taking final action on the proposed designation, and then act promptly to implement the plan.

The Commission believes that a conservation plan may be the appropriate vehicle to address the uncertainties regarding the current status of the bottlenose dolphin stocks and determine when stocks affected by the die-off have recovered .

NMFS intends to begin expeditious preparation of a conservation plan for the coastal–migratory stock of bottlenose dolphins in the mid-Atlantic if a final determination is made that the stock is depleted. Of primary concern in the plan will be the development of consistent indices of post-die-off population abundance to compare with available pre-die-off data and to test experimentally the hypothesis of stock differentiation between the coastal and offshore dolphins. These survey data and experimental results allow further assessment of the probability of stock decline and additional assessment of stock status relative to OSP. For the purpose of assessing population status relative to OSP, reduction levels of less than 40 percent from the estimated carrying capacity will be considered not be have resulted in depleted status of the stock.

The Marine Mammal Coalition (Coalition), representing members of the marine mammal display and scientific research community, pointed out the uncertainties in estimates of dolphin abundance and vital rates and questioned whether information exists to support any conclusions regarding this stock. The Coalition believes that:

The OSP concept has its origin in the politics of conservation; it has little relationship to biology. The depletion concept, as a derivation of OSP, is weaker still * * *. The population is not currently exploited for live-capture, and the estimated human-induced mortality appears to be low (<2%). We recommend that the mid-Atlantic population of bottlenose dolphins not be declared depleted.

As the Coalition pointed out, the mid-Atlantic, coastal-migratory stock is not a source of public display animals. In recent years, captures of bottlenose dolphins for zoos and aquariums have been authorized from the Gulf of Mexico stocks and from the local population in the Indian-Banana River area on Florida's east coast. Thus, the depletion designation is not expected to affect the availability of bottlenose dolphins for the public display industry.

Mathematical estimates using the best available information indicate that the coastal-migratory stock declined by more than 50 percent as a result of the 1987–88 mortality. In arriving at such a conclusion, NMFS used a conservative estimate of both natural mortality levels and the number of animals affected by the die-off. Use of a higher estimate in either case would have resulted in a higher estimate of total mortality. NMFS notes that most estimates of wildlife populations are expressed in terms of confidence intervals. NMFS believes that it would not be fulfilling its responsibilities under the MMPA if it had to wait until there is absolute certainty over the status of a stock before protective actions are initiated. Such a condition would be most likely only after a population is severely depleted, and the process of enabling a population to recover would then be much more difficult.

Greenpeace USA supported the depletion designation and noted that:

Between June 1987 and the end of April 1988, 742 stranded bottlenose dolphins from New Jersey to Florida were reported to the Smithsonian Institution though the number of dolphins found dead is most likely a fraction of the total mortality. Current evidence suggests the coastal migratory stock was primarily affected and that a potential decline for this stock since the beginning of 1987 could be over 50%.

NMFS agrees and, therefore, proposes a depletion designation for this stock.

Classification

The Assistant Administrator for Fisheries, NOAA, determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291. With the exception of a carefully defined permitting process for obtaining animals for public display, the Marine Mammal Protection Act prohibits taking of marine mammals for commercial purposes. The mid-Atlantic, coastal-migratory stock of bottlenose dolphins is not a source of public display animals. The only authorized captures of bottlenose dolphins for public display have been from the Gulf of Mexico and a nonmigratory stock resident in the Indian-Banana River area on Florida's east coast. This rule would, therefore, have no impact on commerce, and the rule will not result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographical regions; or (3) a significant adverse effect on competition, employment, investment, productivity, innovation, or

on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. This rule will have no economic effects save those mandated by statute. Consequently, the General Counsel of the Department of Commerce certified to the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. Additionally, this rule does not contain a collection-of-information requirement subject to the Paperwork Reduction Act.

A designation of depletion in this instance, which is similar to a listing action under section 4(a) of the Endangered Species Act, is categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 216

Administrative practices and procedure, Marine mammals.

Dated: August 9, 1991.

William W. Fox, Jr.,

Assistant Administrator for Fisheries.

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be amended as follows:

PART 216—[AMENDED]

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. In § 216.15, a new paragraph (d) is added to read as follows:

§ 216.15 Depleted species.

* * * * *

(d) Bottlenose dolphin (*Tursiops truncatus*), coastal-migratory stock along the U.S. mid-Atlantic coast.

[FR Doc. 91-19384 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-22-M

Notices

Federal Register
Vol. 56, No. 158
Thursday, August 15, 1991

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

August 9, 1991.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, room 404–W Admin. Bldg., Washington, DC 20250, (202) 447–2118.

Revision

• Forest Service
Free Use Permit—Timber 36 CFR 223.5–223.13
FS–2400–8
On occasion; Annually
Individuals or households; Federal agencies or employees; 50,000 responses; 10,000 hours
Milo Larson, (202) 205–0854

• Agricultural Stabilization and Conservation Service
7 CFR part 1427—Upland Cotton First Handler and Domestic User/Exporter Agreement and Payment Program
CCC–1044 and CCC–1045
On occasion; Weekly
Farms; Small businesses or organization; 29,000 responses; 14,500 hours
Janice Zygmont, (202) 447–6734

• Agricultural Cooperative Service
Annual Survey of Farmer Cooperatives and Questionnaire to Identify Farmer Cooperatives
ACS–13, ACS–14A, B, C, D, E, H
Annually; Once per cooperative
Businesses or other for-profit; Small businesses or organizations; 4,530 responses; 2,225 hours
Ralph Richardson, (202) 245–5387

• Foreign Agricultural Service
Market Promotion Program (MPP)
On occasion; Annually
State or local governments; Businesses or other for-profit; Non-profit institutions; 1,010 responses; 83,450 hours
David McGuire, (202) 382–9169

Extension

• Agricultural Marketing Service
Tokay Grapes grown in San Joaquin County, California Marketing Order No. 926
Recordkeeping; Annually; Every 6 years
Farms; Businesses or other for-profit; Small Businesses or organizations; 311 responses; 13 hours
Kenneth Johnson, (202) 447–5331

• Agricultural Marketing Service
Tomatoes Grown in Florida (Marketing Order No. 966)
Recordkeeping; On occasion; Weekly; Monthly; Annually; Daily Businesses or other for-profit; 287 responses; 35 hours
Kenneth Johnson, (202) 447–5331

• Agricultural Marketing Service
Valencia Oranges Grown in Arizona and Designated Parts of California M.O. No. 908
Recordkeeping; On occasion; Weekly; Annually
Farms; Businesses or other for-profit; 35,527 responses; 20,133 hours
Maureen Pello, (202) 475–3861

New Collection

• Farmers Home Administration
7 CFR 1980–J, Agricultural Resource Conservation Demonstration Program
FmHA 1980–74, 75, 76, 78
Recordkeeping; On occasion; Annually
State of local governments; Farms; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 623 responses; 2,697 hours
Jack Holston, (202) 382–9736

• Food and Nutrition Service
FSP Regulations Part 278—Food Stamp Program Application to Accept and Redeem food Stamps—Addendum 1
FNS–252, FNS–252–2, FNS–350
On occasion
Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 22,715 responses; 7,562 hours
Suzanne Fecteau, (703) 756–3419

• Farmers Home Administration
7 CFR 1940–T, System for Delivery of Certain Rural Development Programs
Recordkeeping; On occasion; Quarterly
State or local governments; 700 responses; 2,915 hours
Jack Holston, (202) 382-9736.

• Food Safety and Inspection Service
Preventing cross/contamination of meat products
Annually
Businesses or other for profits; 5,000 responses; 5,000 hours
Roy Purdie, Jr., (202) 447-5372

• Animal and Plant Health Inspection Service
Virus-Serum-Toxin Act and regulations—Addendum 1
Recordkeeping; On occasion
Businesses or other for-profit; 80 responses; 36 hours
David A. Espeseth, (301) 436-8245

• Food Safety and Inspection Service
Hazard Analysis and Critical Control Point Workshop and Pilot Testing Solicitation of Participants
FSIS–1300–1, and 1300–2
On occasion
Businesses or other for-profit; Small businesses or organizations; 240 responses; 67 hours
Roy Purdie, (202) 447-5372

Reinstatement

• Agricultural Stabilization and Conservation Service
7 CFR parts 777, 1477 and 1413—Disaster Payments and Disaster Assistance Programs
ASCS–574, 574-1, 658; CC–441, 441SU, 441WR, 440
On occasion
Farms; 218,120 responses; 54,532 hours

Charles Cox, (202) 382-8757

Donald E. Hulcher,

Deputy Departmental Clearance Officer.

[FR Doc. 91-19476 Filed 8-14-91; 8:45 am]

BILLING CODE 3410-01-M

Federal Grain Inspection Service

Advisory Committee Meeting

Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. No. 92-463), notice is hereby given of the following committee meeting:

Name: Federal Grain Inspection Service Advisory Committee.

Date: September 12, 1991.

Place: Wheat Marketing Center, 1200 NW. Front, suite 230, Portland, Oregon.

Time: 8 a.m.

Purpose: To provide advice to the Administrator of the Federal Grain Inspection Service with respect to the implementation of the U.S.Grain Standards Act.

The agenda includes: (1) Status of financial matters, (2) FGIS fee structure, (3) status of standards and regulations, (4) sprout damage in wheat, (5) wheat classification, (6) status of research programs, (7) type approval and equipment calibration, and (8) other matters.

The meeting will be open to the public. Public participation will be limited to written statements unless permission is received from the Committee Chairman to orally address the Committee. Persons, other than members, who wish to address the Committee or submit written statements before or after the meeting, should contact John C. Foltz, Administrator, FGIS, U.S. Department of Agriculture, P.O. Box 96454, Washington, DC 20090-6454, telephone (202) 382-0219.

Dated: August 9, 1991.

John C. Foltz,

Administrator.

[FR Doc. 91-19447 Filed 8-14-91; 8:45 am]

BILLING CODE-3410-EN-M

Forest Service

Southern Region; Exemption of Southern Pine Beetle Control To Protect Colonies of the Endangered Red-Cockaded Woodpecker Within Little Lake Creek Wilderness on the Sam Houston National Forest, TX

AGENCY: Forest Service, USDA.

ACTION: Notice; exemption of decision from administrative appeal.

SUMMARY: Pursuant to 36 CFR 217.4(a)(11), the Regional Forester for the Southern Region has determined that good cause exists and notice is hereby given to exempt from administrative appeal the suppression of southern pine beetle infestations within Little Lake Creek Wilderness, Sam Houston National Forest, Texas during the current outbreak. These infestations are threatening colonies and the limited foraging habitat of the red-cockaded woodpecker, a federally-listed endangered species.

EFFECTIVE DATE: This exemption is effective August 15, 1991.

FOR FURTHER INFORMATION CONTACT: Questions about this exemption should be directed to Jean P. Kruglewicz, Environmental Affairs Group Leader, Southern Region, Forest Service-USDA, 1720 Peachtree Road, NW., Atlanta, GA 30367 (404) 347-4867.

SUPPLEMENTARY INFORMATION: The 1973 Endangered Species Act requires that the Forest Service must "seek to conserve endangered species." The USDI Fish and Wildlife Service (FWS) issued a biological opinion, dated December 12, 1986, stating that failure to take action in wildernesses to protect the red-cockaded woodpecker (RCW) colonies from SPB is likely to jeopardize the continued existence of the species. The Forest Service followed the advice of the FWS. A Record of Decision (ROD) for the Final Environmental Impact Statement for the Suppression of the Southern Pine Beetle—Southern Region (SPB-FEIS) was signed by the Chief of the Forest Service on April 6, 1987. The alternative selected in the ROD protects RCW colonies within wilderness and permits the suppression of SPB spots within wilderness. However, stringent criteria were set for determining the need for any control action. In wildernesses where colonies of the RCW are present, SPB spots will be allowed to run their natural course until an essential RCW colony or its foraging habitat is threatened. Before any control action is taken a site-specific environmental analysis must be completed and affected and interested publics informed about potential control-related activities.

Presently, the RCW colonies within Little Lake Creek Wilderness are being threatened by SPB infestations. Due to a major SPB outbreak between 1983 and 1986, the available foraging habitat for the RCW colonies in and around Little Lake Creek Wilderness has been fragmented, leaving the acres of foraging habitat available for many of these colonies at less than the desired 125 acres/colony. For this reason, an analysis is currently underway on a proposed action to suppress SPB infestations to protect further loss of limited foraging habitat for the RCW colonies. The analysis includes the control methods identified in the selected alternative in the ROD for SPB-FEIS. The environmental document being prepared will disclose the effects of the proposed action on the environment, document public involvement, and address the issues raised by the public. Given the existing shortage and fragmentation of foraging habitat, time for action is critical. Any additional delay will result in further loss to presently undamaged resources. This could lead to the loss of an essential RCW colony resulting in a violation of the Endangered Species Act.

Dated: August 9, 1991.

Robert J. Lentz,

Deputy Regional Forester.

[FR Doc. 91-19246 Filed 8-14-91; 8:45 am]

BILLING CODE 3410-11-M

DEPARTMENT OF COMMERCE

Economics and Statistics Administration; Senior Executive Service; Performance Review Board Membership

Below is a listing of individuals who are eligible to serve on the Performance Review Board in accordance with the Economics and Statistics Administration Senior Executive Service (SES) Performance Appraisal System:

Susanne H. Howard—chair
Barbara E. Bryant
C. Louis Kincannon
O. Bryant Benton
William P. Butz
Charles D. Jones
Roland H. Moore
Charles A. Waite
Allan H. Young
Carol S. Carson
John E. Cremeans
Frederick T. Knickerbocker
Harry A. Scarr
Joseph F. Caponio
Robert B. Ellert
Daniel B. Levine
Katherine K. Wallman

Edward A. McCaw,

Executive Secretary, Economics and Statistics Administration, Performance Review Board.

[FR Doc. 91-19463 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-BS-M

Bureau of Export Administration

Action Affecting Export Privileges; Yuzo Oshima and The Sound You Co., Ltd.

Order Temporarily Denying Export Privileges

The Office of Export Enforcement, Bureau of Export Administration, United States Department of Commerce (Department), pursuant to the provisions of § 788.19 of the Export Administration Regulations (currently codified at 15 CFR parts 768–799 (1991)) (the Regulations), issued pursuant to the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. 2401–2420 (1991)) (Act),[1] has asked the Assistant Secretary for Export Enforcement to renew an order temporarily denying all United States export privileges to Yuzo Oshima (Oshima) and The Sound You Company, Ltd. (Sound You). The initial order was issued on February 11, 1991 (56 FR 7007, February 21, 1991).

In its renewal request of July 19, 1991, the Department stated that it continues to have reason to believe that an order temporarily denying the export privileges of Oshima and Sound You is necessary in the public interest to prevent an imminent violation of the Regulations.

In its initial request, the Department stated that, as a result of its investigation, the Department had reason believe that, during the period February 20, 1990 to February 5, 1991, Oshima and Sound You were trying to obtain near state-of-the-art Intel CPU-386 microprocessors, controlled for reasons of national security, so that they could export that equipment from the United States to North Korea, a country against which the United States has virtually complete embargo, without first obtaining the required validated license. There is a presumption that a license application to ship the CPU-386 microprocessors to North Korea would not be granted.

The Department also stated that the investigation had given it reason to believe that Oshima and Sound You intend to effectuate the export of the Intel CPU-386 microprocessors from the United States by sending them to third countries and then reexporting them to North Korea. The Department also had reason to believe that Oshima and Sound You are capable of bringing about such exports because it believed that Oshima and Sound You have access to large sums of money and that, given the opportunity, they would use that money in the near future to acquire the CPU-386 microprocessors and export them through other countries to North Korea.

In its renewal request, the Department stated that nothing the Department had learned since the time of its initial request has given it reason to believe that its initial suspicious were inaccurate. Indeed, the Department noted that, since the initial request, the Department has received information that gives it reason to believe that a TDO is still necessary and appropriate.

Specifically, the Department stated that Oshima originally informed Intel (the manufactures of the CPU-386s) that it wanted the CPU-386s for export to North Korea, but subsequently changed his story, saying he wanted to export the CPU-386s to, *inter alia*, two end users in Taiwan. The Department further stated that, since the issuance of the original TDO, it has obtained information which gives it reason to believe that story was false. The Department further believes that Oshima provided the false information to the Department because he wanted to obtain the CPU-386s under the guise that they were going to be exported to Taiwan, when in fact he really intended to ship them to North Korea as he had originally planned.

In addition, in its initial request, the Department noted that, on February 6, 1991, it had initiated administrative proceedings against Oshima and Sound You. Those matters are presently before the Office of the Administrative Law Judge (ALJ). The record for decision in both matters is scheduled to close on August 30, 1991.[2] Nevertheless, in light of the above-described events and those described in the Department's initial request, the Department continues to believe that the violations Oshima and Sound You are suspected of having committed were deliberate and covert and are likely to occur again unless the temporary denial order naming Oshima and Sound You is renewed. In addition, the Department believes that, pending resolution of the administrative actions the Department has initiated against Oshima and Sound You, renewal of the temporary denial order is necessary to give notice to companies in the United States and abroad that they should cease dealing with Oshima and Sound You in transactions involving U.S.-origin goods.

No opposition was filed in response to the Department's request for renewal. Therefore, based on the showing made by the Department, I find that an order temporarily denying the export privileges of Yuzo Oshima and The Sound You Company, Ltd. is necessary in the public interest to prevent an imminent violation of the Act and the Regulations and to give notice to companies in the United States and abroad to cease dealing with Yuzo Oshima and The Sound You Company, Ltd. in goods and technical data subject to the Act and the Regulations, in order to reduce the substantial likelihood that Yuzo Oshima and The Sound You Company, Ltd. will continue to engage in activities that are in violation of the Act and the Regulations.

Accordingly, it is hereby ordered.

I. All outstanding individual validated licenses in which Oshima or Sound You appear or participate, in any manner or capacity, are hereby revoked and shall be returned forthwith to the Office of Export Licensing for cancellation. Further, all of Oshima's and Sound You's privileges of participating, in any manner or capacity, in any special licensing procedure, including, but not limited to, distribution licenses, are hereby revoked.

II. For a period of 180 days from the date of entry of this order, Yuzo Oshima and The Sound You Company, Ltd., both with an address at Tatsuno-Nishitenma Building, 3–1–6, Nishitenma, Kita-ku, Osaka, Japan, and all successors, assignees, officers, partners, representatives, agents, and employees, hereby are denied all privileges of participating, directly or indirectly, in any manner or capacity, in any transaction in the United States or abroad involving any commodity or technical data exported or to be exported from the United States, in whole or in part, or that is otherwise subject to the Act and the Regulations. Without limiting the generality of the foregoing, participation, either in the United States or abroad, shall include participation, directly or indirectly, in any manner or capacity: (i) As a party or as a representative of a party to any export license application submitted to the Department; (ii) in preparing or filing with the Department any export license application or request for reexport authorization, or any document to be submitted therewith; (iii) in obtaining

[1] The Act expired on September 30, 1990. Executive Order 12730 (55 FR 40373, October 2, 1990) continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. 1701–1706 (1991)).

[2] Section 788.19 contemplates the issuance of temporary denial orders after a party has been charged and the matter is pending before the ALJ. Specifically, § 788.19(b)(3) of the Regulations provides that "[t]o establish grounds for the temporary denial order, the Department may show * * * that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations."

from the Department or using any validated or general export license or other export control document; (iv) in carrying on negotiations with respect to, or in receiving, ordering, buying, selling, delivering, storing, using, or disposing of, in whole or in part, any commodity or technical data exported or to be exported from the United States, in whole or in part, or that is otherwise subject to the Act and the Regulations; and (v) in financing, forwarding, transporting, or other servicing of such commodities or technical data.

III. After notice and opportunity for comment as provided in § 788.3(c), any person, firm, corporation, or business organization related to Oshima and/or Sound You by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. Without prior disclosure of the facts to and specific authorization of the Office of Export Licensing, in consultation with the Office of Export Enforcement, no person may directly or indirectly, in any manner or capacity: (i) Apply for, obtain, or use any license, Shipper's Export Declaration, bill of lading, or other export control document relating to an export or reexport of commodities or technical data by, to, or for another person then subject to an order revoking or denying his export privileges or then excluded from practice before the Bureau of Export Administration; or (ii) order, buy, receive, use, sell, deliver, store, dispose of, forward, transport, finance, or otherwise service or participate (a) in any transaction which may involve any commodity or technical data exported or to be exported from the United States, (b) in any reexport thereof, or (c) in any other transaction which is subject to the Export Administration Regulations, if the person denied export privileges may obtain any benefit from or have any interest in, directly or indirectly, any of these transactions.

V. In accordance with the provisions of § 788.19(e) of the Regulations, either respondent may, at any time, appeal this temporary denial order by filing with the Office of the Administrative Law Judge, U.S. Department of Commerce, room H-6716, 14th Street and Constitution Avenue NW., Washington, DC 20230, a full written statement in support of the appeal.

VI. This order is effective immediately and shall remain in effect for 180 days.

VII. In accordance with the provisions of § 788.19(d) of the Regulations, the Department may seek renewal of this temporary denial order by filing a written request not later than 20 days before the expiration date. Either respondent may oppose a request to renew this temporary denial order by filing a written submission with the Assistant Secretary for Export Enforcement, which must be received not later than seven days before the expiration date of this order.

A copy of this order shall be served on each respondent and this order shall be published in the Federal Register.

Dated: August 8, 1991.

Frank W. Deliberti,

Acting Assistant Secretary for Export Enforcement.

[FR Doc. 91-19487 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-DT-M

International Trade Administration

Export Trade Certificate of Review

ACTION: Notice of application for an amendment to an Export Trade Certificate of Review.

SUMMARY: The Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, has received an application for an amendment to an Export Trade Certificate of Review. This notice summarizes the amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: George Muller, Director, Office of Export Trading Company Affairs, International Trade Administration, 202/377-5131. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 4001-21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. A Certificate of Review protects the holder and the members identified in the Certificate from state and federal government antitrust actions and from private, treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Act and 15 CFR 325.6(a) require the Secretary to publish a notice in the Federal Register identifying the applicant and summarizing its proposed export conduct.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether the Certificate should be amended. An original and five (5) copies should be submitted no later than 20 days after the date of this notice to: Office of Export Trading Company Affairs, International Trade Administration, Department of Commerce, room 1800H, Washington, DC 20230. Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). Comments should refer to this application as "Export Trade Certificate of Review, application number 90-A0017."

The Office of Export Trading Company Affairs has received the following application for an amendment to Export Trade Certificate of Review No. 90-00017, which was issued on March 21, 1991 (56 FR 13451, April 2, 1991).

Summary of the Application

Applicant: Brass and Bronze Ingot Manufacturers ("BBIM"), 300 West Washington, suite 1500, Chicago, Illinois 60606, Contact: Phillip B. Bowman, Executive Director, Telephone: (312) 236-2713.

Application No.: 90-A0017.

Date Deemed Submitted: August 9, 1991.

Request For Amended Conduct: BBIM seeks to amend its Certificate to:

1. Add the following company as a "Member" within the meaning of § 325.2(1) of the Regulations (15 CFR 325.2 (1)): R. Lavin & Sons, Inc., Chicago, Illinois; and

2. Include Canada in the Export Markets to which BBIM and its Members export or intend to export their goods and services.

Dated: August 9, 1991.

George Muller,

Director, Office of Export Trading Company Affairs.

[FR Doc. 91-19503 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-DR-M

Short-Supply Determination; Certain Steel Plate

AGENCY: Import Administration, International Trade Administration, Commerce.

ACTION: Notice of short-supply determination on certain steel plate.

SHORT-SUPPLY REVIEW NUMBER: 54.

SUMMARY: The Secretary of Commerce hereby grants a short-supply request for 20,382.6 net tons of certain steel plate for the fourth quarter of 1991 under Article 8 of the U.S.-E.C. steel arrangement.

EFFECTIVE DATE: August 9, 1991.

FOR FURTHER INFORMATION CONTACT: Mark B. Brechtl or Richard O. Weible, Office of Agreements Compliance,

Import Administration, U.S. Department of Commerce, room 7866, Pennsylvania Avenue and 14th Street NW., Washington, DC 20230, (202) 377–1386 or 377–0159.

SUPPLEMENTARY INFORMATION: On July 10, 1991, the Secretary of Commerce ("Secretary") received an adequate petition from Berg Steel Pipe Corporation ("Berg") requesting a short-supply allowance for 21,782.6 net tons of American Petroleum Institute X–70 grade (modified) steel plate 130.297 to 130.966 inches in width and 0.417 to 0.630 inch in thickness for the fourth quarter of 1991 under Article 8 of the Arrangement Between the European Coal and Steel Community and the European Economic Community, and the Government of the United States of America Concerning Trade in Certain Steel Products. Berg will use the X–70 grade material to manufacture large diameter pipe ("LDP") for TransCanada Pipelines ("TransCanada"), a Canadian company which will use the LDP to construct a natural gas pipeline in Canada. Berg is requesting short supply for 21,782.6 net tons of steel plate because it believes that no domestic producer will be able to meet its needs during the requested time period and because its potential European supplier does not have sufficient regular export licenses available. The Secretary conducted this short-supply review pursuant to section 4(b)(4)(A) of the Steel Trade Liberalization Program Implementation Act, Public Law No. 101–221, 103 Stat. 1886 (1989) (the "Act"), and Section 357.102 of the Department of Commerce's Short-Supply Procedures. (19 CFR 357.102) ("Commerce's Short-Supply Procedures").

On July 10, 1991, the Secretary established an official record for this short-supply request (Case Number 54) in the Central Records Unit, Room B–099, Import Administration, U.S. Department of Commerce at the above address. On July 19, 1991, the Secretary published a notice in the **Federal Register** (56 FR 33258) announcing a review of this request and soliciting comments from interested parties. Comments were required to be received no later than July 26, 1991, and interested parties were invited to file replies to any comments no later than five days after that date. In order to determine whether this product could be supplied by U.S. producers during the third quarter of 1991, the Secretary sent questionnaries to the three domestic steel plate producers, Bethlehem Steel Corporation ("Bethlehem"), United States Steel ("USS"), and Oregon Steel Mills ("OSM"). The Secretary received timely questionnaire responses from Bethlehem and USS, supplemental comments from Berg, rebuttal comments from Berg regarding USS's response, and comments from USS in response to Berg's rebuttal comments. OSM did not respond to the questionnaire.

Questionnaire Response

Bethlehem stated that it is not able to supply Berg with the subject steel plate during the requested time period because it cannot meet the noted specifications. USS stated in its questionnaire response that it could supply 1,400 to 4,200 tons of any combination of the two sizes requested by Berg for delivery between October 13 and October 16, 1991. USS states that it generally can meet Berg's specifications.

Berg's supplemental comments of July 25, 1991, included a letter from TransCanada in which its materials engineering department states it must approve all potential steel plate and pipe manufacturers before use of their product. Currently, it notes that no U.S. steel producers and approved suppliers. Further, Berg states that TransCanada has received quotations for all 1991/1992 pipeline construction; therefore, there is no opportunity for additional plate manufacturers to gain approval for these projects.

Berg's July 31, 1991, rebuttal comments to USS's questionnaire response focused on the following: (1) USS's lack of approval by TransCanada as a supplier; (2) USS's lack of in-line ultrasonic testing; (3) USS's reliability as a supplier; and (4) the price of the material offered by USS. Berg reiterated that USS is not an approved supplier to its customer, TransCanada. Berg states further that "because USS was not approved as a supplier before the issuance of the TransCanada request for bids, it cannot now be considered."

Berg claims that because USS lacks in-line ultrasonic testing it cannot produce and inspect more than 15 plates per day, a rate which Berg claims will not permit USS to supply 4,200 net tons before the November 17, 1991, deadline. Berg contends further that USS's lack of in-line ultrasonic testing is inefficient and costly and increases the risk of damage to the plate during transfer of the off-line facility.

Berg also asserts that USS's revised price is still an aberration from the prevailing domestic market price, due in part to the additional cost of off-site testing. Berg maintains that although USS revised its original price quote downward, its price per ton remains greater than that of Berg's foreign supplier and other domestic suppliers.

In its response to Berg's rebuttal comments, USS submitted additional comments on August 5, 1991, stating that it is ready and willing to begin the process for approval with Berg and TransCanada. USS also asserted that its lack of in-line ultrasonic testing affects its lack of in-line ultrasonic testing affects its rate of production, not its capability to produce the requested material. USS claims it can 100 percent ultrasonic test 150 plates per week, which it notes is an improvement over its previous testing rate of 15 plates per day.

USS states further that it received Berg's final revision to the specifications on this inquiry on June 5, 1991, and responded on June 7, 1991. Therefore, its response was not untimely as Berg alleged. USS also revised its offer downward from 4,200 net tons to supply from 1,200 to 1,400 net tons total of either size specified in the request during the time period requested by Berg.

Analysis

The major issue in this short-supply review is whether USS is an acceptable supplier of the requested X–70 grade steel plate. The amount of steel plate offered by USS is 1,200 to 1,400 net tons. No domestic manufacturer has offered to supply the remaining 20,382.6 net tons of the request.

Berg's customer, TransCanada, states that its materials engineering department must approve all steel, plate and pipe manufacturers. However, TransCanada and Berg do not dispute that USS can meet the specifications for the requested steel plate. TransCanada merely states that "there are currently no steel or plate manufacturers in the USA approved." While the Secretary is sympathetic to the need of steel purchasers to acquire material with particular specifications in order to be able to supply its own customers, neither Berg nor TransCanada has identified any specifications required by TransCanada that USS cannot meet. (House Report to the Steel Trade Liberalization Program Implementation Act, H.R. No. 263, 101st Cong., 1st sess. at 15.) The fact that USS has not yet been subject to TransCanada's general approval process does not suggest that USS cannot meet the particular specifications of the requested product. Therefore, USS should be considered able to supply the noted steel plate.

Further, Berg contacted USS about supplying the order without attempting to approve USS as a supplier of steel plate to TransCanada. USS states that it is willing to pursue approval with

TransCanada and that the approval can be done without delaying its proposed delivery schedule. Our review of the approval requirements for a steel supplier indicates that approval entails only a review of steelmaking practices, heating and rolling procedures, and experience producing comparable material. It does not entail the actual production of material for TransCanada to test. In fact, Berg states in its June 13, 1991, letter to USS that if USS could agree to the terms set forth in the letter, "then we can go to our customer and ask for their approval of plates from the Gary Works" of USS. The Secretary can only conclude that the approval process may be accomplished in an manner which would not cause undue delay in the delivery of Berg's order.

Berg also contends that USS's lack of in-line ultrasonic testing unnecessarily adds to the cost of the plate and delays its delivery. While USS does conduct ultrasonic testing off site, it states that this will not delay production or delivery of the material. USS has revised the amount of plate that it offered to supply based on the added time associated, and Berg has provided no substantive information to dispute that USS can supply this amount within the requested time period.

Concerning Berg's argument that USS's price is an aberration from the prevailing domestic market price, the Secretary does not consider the price offered by USS to be an aberration. It is within the range of prices in which USS is selling comparable X-70 plate to another U.S. LDP manufacturer. In addition, USS has reduced its price of this product to Berg and has indicated a willingness to become qualified to Berg and develop a long-term commercial relationship. Therefore, based on the information presented above, the Secretary finds that USS is an acceptable supplier of the requested steel plate.

Conclusion

Because no domestic steel producer is able to supply the 20,382.6 net ton quantity of the requested X-70 grade steel plate during the indicated time period, the Secretary finds that a condition of short supply does exist for this amount. This represents the difference between the maximum amount of the material offered by USS (1,400 net tons) and Berg's short-supply request (21,782.6 net tons). Pursuant to section 4(b)(4)(A) of the Act, and § 357.102 of Commerce's Short-Supply Procedures, the Secretary grants Berg a short-supply allowance for 20,382.6 net tons of the X-70 grade steel plate included in this request for the fourth quarter of 1991 under the U.S.-E.C. steel arrangement. However, if it is later demonstrated that USS is unable to supply Berg with the type and amount of steel plate offered by USS, the Secretary may reconsider this determination.

Dated: August 9, 1991.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 91-19508 Filed 8-14-91; 8:45 am]

BILLING CODE 3510-DS-M

Minority Business Development Agency

Business Development Center Applications; Tulsa, OK

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its Minority Business Development Center (MBDC) program to operate an MBDC for approximately a 3-year, period, subject to Agency priorities, recipient performance and the availability of funds. The cost of performance for the first budget period (12 months) is estimated at $165,000 in Federal funds, and a minimum of $29,118 in non-Federal (cost sharing) contributions from January 1, 1992 to December 31, 1992. Cost-sharing contributions may be in the form of cash contributions, client fees, in-kind contributions or combinations thereof. The MBDC will operate in the Tulsa, Oklahoma geographic service area.

The funding instrument for the MBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian tribes and educational institutions.

The MBDC program is designed to provide business development services to the minority business community for the establishment and operation of viable minority businesses. To this end, MBDA funds organizations that can identify and coordinate public and private sector resources on behalf of minority individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding minority business.

Applications will be evaluated initially by regional staff on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of minority businesses, individuals and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. The selection of an application for further processing by MBDA will be made by the Director based on a determination of the application most likely to further the purpose of the MBDC Program. The application will then be forwarded to the Department for final processing and approval, if appropriate. The Director will consider past performance of the applicant on previous Federal awards.

MBDCs shall be required to contribute at least 15% of the total project cost through non-Federal contributions. To assist them in this effort, MBDCs may charge client fees for management and technical assistance (M&TA) rendered. Based on a standard rate of $50 per hour, MBDCs will charge client fees at 20% of the total cost for firms with gross sales of $500,000 or less, and 35% of the total cost for firms with gross sales of over $500,000.

MBDCs performing satisfactorily may continue to operate after the initial competitive year for up to 2 additional budget periods. MBDCs with year-to-date "commendable" and "excellent" performance ratings may continue to be funded for up to 3 or 4 additional budget periods, respectively. Under no circumstances shall an MBDC be funded for more than 5 consecutive budget periods without competition. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an MBDC's performance, the availability of funds and Agency priorities.

Awards under this program shall be subject to all Federal and Departmental regulations, policies, and procedures applicable to Federal assistance awards.

In accordance with OMB Circular A-129, "Managing Federal Credit Programs," applicants who have an outstanding account receivable with the Federal Government may not be considered for funding until these debts

have been paid or arrangements satisfactory to the Department of Commerce are made to pay the debt.

Applicants are subject to Governmentwide Debarment and Suspension (Nonprocurement) requirements as stated in 15 CFR part 26.

The Departmental Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the MBDC has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are failure to meet cost-sharing requirements; unsatisfactory performance of MBDC work requirements; and reporting inaccurate or inflated claims of client assistance or client certification. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

On November 18, 1988, Congress enacted the Drug-Free Workplace Act of 1988 (Public Law 100–690, title V, subtitle D). The statute requires contractors and grantees of Federal agencies to certify that they will provide a drug-free workplace. Pursuant to these requirements, the applicable certification form must be completed by each applicant as a precondition for receiving Federal grant or cooperative agreement awards.

"Certification for Contracts, Grants, Loans, and Cooperative Agreement" and SF–LLL, the "Disclosure of Lobbying Activities" (if applicable) is required in accordance with section 319 of Public Law 101–121, which generally prohibits recipients of Federal contracts, grants, and loans from using Legislative Branches of the Federal Government in connection with a specific contract, grant or loan.

CLOSING DATE: The closing date for applications is September 16, 1991. Applications must be postmarked on or before September 16, 1991.

Note: Please mail completed application to the following address:

San Francisco Regional Office, 221 Main Street, room 1280, San Francisco, California 94105.

FOR APPLICATION KIT OR OTHER INFORMATION CONTACT: Dallas Regional Office, 1100 Commerce Street, room 7B23, Dallas, Texas 75242, Attn: Yvonne Guevara, (214) 767–8001.

A pre-bid conference will be held on August 22, 1991 in the U.S. Courthouse, room 411 (Grand Jury Room), on 333 West 4th Street, Tulsa, Oklahoma at 10 a.m.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained at the above address.

11.800 Minority Business Development (Catalog of Federal Domestic Assistance)

Dated: August 9, 1991.

Victor Casaus,

Deputy Regional Director, Dallas Regional Office.

[FR Doc. 91–19425 Filed 8–14–91; 8:45 am]

BILLING CODE 3510–21–M

Business Development Center Applications: Northwest IBDC

AGENCY: Minority Business Development Agency, Commerce.

ACTION: Notice.

SUMMARY: In accordance with Executive Order 11625, the Minority Business Development Agency (MBDA) is soliciting competitive applications under its American Indian Program to operate Indian Business Development Center (IBDC) for approximately a 3-year period, subject to Agency priorities, recipient performance, and the availability of funds. The cost of performance for the first budget period (12 months) is estimated at $200,000 in Federal funds. The period of performance will be from January 1, 1992 to December 31, 1992. The IBDC will operate in the Washington, Oregon, and Idaho Geographic Service Area.

The award number for this IBDC will be 10–10–92001–01.

The funding instrument for the IBDC will be a cooperative agreement. Competition is open to individuals, non-profit and for-profit organizations, state and local governments, American Indian Tribes and educational institutions.

The American Indian program is designed to provide business development services to the American Indian business community for the establishment and operation of viable American Indian businesses. To this end, MBDA funds organizations that can identify and coordinate public and private sector resources on behalf of American Indian individuals and firms; offer a full range of management and technical assistance; and serve as a conduit of information and assistance regarding American Indian business.

Applications will be evaluated initially by regional staff on the following criteria: The experience and capabilities of the firm and its staff in addressing the needs of the business community in general and, specifically, the special needs of American Indian businesses, individual and organizations (50 points); the resources available to the firm in providing business development services (10 points); the firm's approach (techniques and methodologies) to performing the work requirements included in the application (20 points); and the firm's estimated cost for providing such assistance (20 points). An application must receive at least 70% of the points assigned to any one evaluation criteria category to be considered programmatically acceptable and responsive. The selection of an application for further processing by MBDA will be made by the Director based on a determination of the application most likely to further the purpose of the American Indian program. The application will then be forwarded to the Department for final processing and approval, if appropriate. The Director will consider past performance of the applicant on previous Federal awards.

IBDCs performing satisfactorily may continue to operate after the initial competitive year for up to 2 additional budget periods. IBDCs with year-to-date "commendable" and "excellent" performance ratings may continue to be funded for up to 3 or 4 additional budget periods, respectively. Under no circumstances shall an IBDC be funded for more than 5 consecutive budget periods without competition. Periodic reviews culminating in year-to-date quantitative and qualitative evaluations will be conducted to determine if funding for the project should continue. Continued funding will be at the discretion of MBDA based on such factors as an IBDC's performance, the availability of funds and Agency priorities.

Awards under this program shall be subject to all Federal and Departmental regulations, policies, and procedures applicable to Federal assistance awards.

In accordance with OMB Circular A–129, "Managing Federal Credit Programs," applicants who have an outstanding account receivable with the Federal Government may not be considered for funding until these debts have been paid or arrangements satisfactory to the Department of Commerce are made to pay the debt.

Applicants are subject to Governmentwide Debarment and Suspension (Nonprocurement) requirements as stated in 15 CFR part 26.

The Department Grants Officer may terminate any grant/cooperative agreement in whole or in part at any time before the date of completion whenever it is determined that the BDC has failed to comply with the conditions of the grant/cooperative agreement. Examples of some of the conditions which can cause termination are unsatisfactory performance of BDC work requirements; and reporting inaccurate or inflated claims of client assistance or client certification. Such inaccurate or inflated claims may be deemed illegal and punishable by law.

On November 18, 1988, Congress enacted the Drug-Free Workplace Act of 1988 (Public Law 100–690, title V, subtitle D). The statute requires contractors and grantees of Federal agencies to certify that they will provide a drug-free workplace. Pursuant to these requirements, the applicable certification form must be completed by each applicant as a precondition for receiving Federal grant or cooperative agreement awards.

"Certification for Contracts, Grants, Loans, and Cooperative Agreements" and SF-LLL, the "Disclosure of Lobbying Activities" (if applicable) is required in accordance with section 319 of Public Law 101–121, which generally prohibits recipients of Federal contracts, grants, and loans from using Legislative Branches of the Federal Government in connection with a specific contract, grant or loan.

CLOSING DATE: The closing date for submitting an application is September 25, 1991. Applications must be postmarked on or before September 25, 1991.

Proposal will be reviewed by the Atlanta Regional Office. The mailing address for submission is: Atlanta Regional Office, Minority Business Development Agency, U.S. Department of Commerce, 401 West Peachtree Street NW., suite 1930, Atlanta, Georgia 30308–3516, 404/730–3300.

A pre-application conference to assist all interested applicants will be held at the following address and time: San Francisco Regional Office, Minority Business Development Agency, U.S. Department of Commerce, 221 Main Street, room 1280, San Francisco, California 94105, September 4, 1991 at 10 a.m.

FOR FURTHER INFORMATION CONTACT: Xavier Mena, Regional Director, San Francisco Regional Office at 415/744–3001.

SUPPLEMENTARY INFORMATION: Anticipated processing time of this award is 120 days. Executive Order 12372, "Intergovernmental Review of Federal Programs," is not applicable to this program. Questions concerning the preceding information, copies of application kits and applicable regulations can be obtained from the San Francisco Regional Office.

11.801 American Indian Program (Catalog of Federal Domestic Assistance)

Dated: August 9, 1991.

Xavier Mena,

Regional Director, San Francisco Regional Office.

[FR Doc. 91–19427 Filed 8–14–91; 8:45 am]

BILLING CODE 3510–21–M

COMPETITIVENESS POLICY COUNCIL

Meetings

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the Competitiveness Policy Council announces a forthcoming meeting of the Council.

DATES: September 6, 1991, 8:30 a.m. to 5:30 p.m.

ADDRESSES: Eigth Floor Conference Center, 11 Dupont Circle, NW., Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Howard Rosen, Sixth Floor, 11 Dupont Circle, NW., Washington, DC 20036, (202) 328–0583.

SUPPLEMENTARY INFORMATION: The Competitiveness Policy Council (CPC) was established by the Competitiveness Policy Council Act, as contained in the Trade and Competitiveness Act of 1988, Public Law 100–418, sections 5201–5210, as amended by the Customs and Trade Act of 1990, Public Law 101–382, section 133. The CPC is composed of 12 members and is to advise the President and Congress on matters concerning the competitiveness of the US economy. This is the Council's second meeting. The main purpose of the meeting is to discuss the Council's workplan. The Council's chairman, Dr. C. Fred Bergsten, will chair the meeting.

The meeting will be open to the public up to the seating capacity of the room. Visitors will be requested to sign a visitor's register.

Type of Meeting: Open.

Agenda: The meeting will open with a report from the Chairman on his discussions with representatives from business, labor, academia, and government concerning the Council's workplan. The Council will then discuss the plan, and other related issues.

Dated: August 9, 1991.

C. Fred Bergsten,

Chairman, Competitiveness Policy Council.

[FR Doc. 91–19398 Filed 8–14–91; 8:45 am]

BILLING CODE 6820–11–M

DEPARTMENT OF DEFENSE

Office of the Secretary

DOD Advisory Panel on Streamlining and Codifying Acquisition Laws

AGENCY: Defense Systems Management College, DOD.

ACTION: Notice of meeting.

SUMMARY: Open to the public on September 5, 1991, starting at 9 a.m. at the Defense Systems Management College in Building 184 on Fort Belvoir, VA. For further information, contact Laura Neal, (703) 355–2662.

Dated: August 9, 1991.

Linda M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 91–19334 Filed 8–14–91; 8:45 am]

BILLING CODE 3810–01–M

Department of the Army

Armed Forces Epidemiological Board; Meetings

AGENCY: Armed Forces Epidemiological Board, DOD.

ACTION: Notice of open meeting.

1. In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463) announcement is made of the following committee meeting:

Name of Committee:: Armed Forces Epidemiological Board, DOD.

Date of Meeting: 10–11 October 1991.

Time: 0830–1700 (10 Oct. 91), 0800–1100 (11 Oct. 91).

Place: Parson's Island, Chester, Maryland.

Proposed Agenda: Military preventive medicine program reports, HIV and AIDS updates, military health care and infectious disease issues.

2. This meeting will be open to the public but limited space accommodations. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee.

FOR FURTHER INFORMATION CONTACT: Interested persons wishing to participate should advise the Executive Secretary, AFEB, Skyline Six, 5109 Leesburg Pike, room 667, Falls Church,

VA 22041-3258, CPT Parsons (703) 756-8012.

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 91-19493 Filed 8-14-91; 8:45 am]

BILLING CODE 3710-08-M

Patent Availability

AGENCY: Walter Reed Army Institute of Research, DOD.

ACTION: Notice.

SUMMARY: The Department of the Army announces the general availability of exclusive, partially exclusive, or nonexclusive licenses under the following patent application:

Patent Application Serial Number: 07/679,990.

Title: Computer Driven Amino Acid Indexer for Reptide Synthesis.

Filing Date: 3 April 1991.

FOR FURTHER INFORMATION CONTACT: Earl T. Reichert, Department of the Army, Office of the Judge Advocate General, Intellectual Property Law Division, 5611 Columbia Pike, ATTN: JALS-IP, Falls Church, VA 22041-5013. (703) 756-2623.

Kenneth L. Denton,

Alternate Army Federal Register Liaison Officer.

[FR Doc. 91-19502 Filed 8-14-91; 8:45 am]

BILLING CODE 1710-08-M

DEPARTMENT OF EDUCATION

Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before September 16, 1991.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Mary P. Liggett, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Mary P. Liggett (202) 708-5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Acting Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following:

(1) Type of review requested, e.g., new, revision, extension, existing or reinstatement, (2) title; (3) Frequency of collection; (4) the affected public; (5) reporting burden; and/or (6) recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Mary P. Liggett at the address specified above.

Dated: August 9, 1991.

Mary P. Liggett,

Acting Director, Office of Information Resources Management.

Office of Special Education and Rehabilitative Services

Type of Review: New.

Title: Evaluation of Quality Assurance (QA) Systems in State Vocational (VR) Agencies.

Frequency: One time only.

Affected Public: State or local governments.

Reporting Burden—Responses: 332, Burden Hours: 332.

Recordkeeping Burden—Recordkeepers: 0, Burden Hours: 0.

Abstract: This report is used by State Vocational Rehabilitative agencies to provide caseload data. The Department uses the information collected to assess the accomplishments and for program management.

[FR Doc. 91-19417 Filed 8-14-91; 8:45 am]

BILLING CODE 4000-01-M

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of proposed information collection requests.

SUMMARY: The Director, Office of Information Resources Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1980.

DATES: Interested persons are invited to submit comments on or before September 16, 1991.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Dan Chenok: Desk Officer, Department of Education, Office of Management and Budget, 726 Jackson Place, NW., room 3208, New Executive Office Building, Washington, DC 20503. Requests for copies of the proposed information collection requests should be addressed to Mary P. Liggett, Department of Education, 400 Maryland Avenue, SW., room 5624, Regional Office Building 3, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Mary P. Liggett (202) 708-5174.

SUPPLEMENTARY INFORMATION: Section 3517 of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations.

The Acting Director, Office of Information Resources Management, publishes this notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g., new, revision, extension, existing or reinstatement; (2) Title; (3) Frequency of collection; (4) The affected public; (5) Reporting burden; and/or (6) Recordkeeping burden; and (7) Abstract. OMB invites public comment at the address specified above. Copies of the requests are available from Mary P. Liggett at the address specified above.

Dated: August 9, 1991.

Mary P. Liggett,

Acting Director, Office of Information Resources Management.

Office of Postsecondary Education

Type of Review: New.

Title: Application for the FIPSE Special Focus Competition on Partnerships to Improve Learning of Essential Academic Subjects, Kindergarten through College.

Frequency: Annually.

Affected Public: State or local governments; Non-profit institutions; Small businesses or organizations.

Reporting Burden:

Responses: 80

Burden Hours: 2,000

Recordkeeping Burden:

Recordkeepers: 0

Burden Hours: 0

Abstract: This form will be used by State Educational Agencies to apply for grants under the FIPSE Special Focus Competition on Partnerships to Improve Learning of Essential Academic Subjects Program. The Department uses the information to make grant awards.

[FR Doc. 91–19415 Filed 8–14–91; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Empire State Electric Energy Research Corp.; Justification for Acceptance of an Unsolicited Application

AGENCY: Department of Energy (DOE).

ACTION: Notice.

SUMMARY: DOE announces that pursuant to 10 CFR 600.14 it intends to award on a noncompetitive basis a grant to Empire State Electric Energy Research Corporation (ESEERCO) to demonstrate and analyze the performance of high phase order power transmission on an electric grid. The grant will be awarded for a three-year period. DOE support is estimated at $2,600,000.

FOR FURTHER INFORMATION CONTACT: Dietrich J. Roesler, DOE Project Manager, Office of Energy Management, U.S. Department of Energy, 1000 Independence Ave., SW., Washington, DC 20585, (202) 586–1495.

SUPPLEMENTARY INFORMATION: The purpose of the project is: (1) To demonstrate that two existing 3-phase lines can be converted to high phase operation, (2) to successfully integrate a 6-phase transmission line into an existing 3-phase electric utility network, and (3) to show the benefits or operation on a commercial basis. The purpose shall be accomplished by performing the required engineering studies to convert the line to high phase order, configuring the substation equipment at both ends of an existing 3-phase double-circuit line for 6-phase operation, and then testing the line operation.

The demonstration project is divided into 4 parts: (1) To perform analytical studies, development of design criteria, and detailed cost estimate, (2) to perform the detailed design engineering, material procurement and line construction, (3) to test, operate, and maintain the line for a 2-year period, and (4) to decommission the line Part I of the demonstration was funded by ESEERCO and has been completed. ESEERCO is seeking DOE funding for Parts 2, 3, and 4 of the demonstration.

New York State Electric and Gas Co. (NYSEG) will be the host utility for the demonstration project, and has identified one of its lines for conversion to 6-phase operation. The selected line is a 115–kV double-circuit line between the Goudey and Oakdale transmission substations. The line was selected because it is not critical to the overall NYSEG transmission system operation and can be taken out of service as required. The line is 1.51 miles long and has 13 transmission towers and has a rating of 250 MW.

Conversion from double-circuit 3-phase to 6-phase has the effect of reducing electric field at the conductor surface for the same phase-to-ground voltage. This reduction can be utilized by: (1) Increasing the phase-to-ground voltage until the conductor surface electric filed is a maximum for corona, thus increasing the power handling capacity of the line, or (2) bring the conductors closer together at the same phase-to-ground voltage until the conductor surface electric field is a maximum for corona, this making the line more compact.

The design philosophy is to minimize the changes and costs of the line conversion. The assumptions are: (1) The voltage level will be raised rather than changing the conductor spacing, (2) the standard equipment voltage levels of 115, 161 and 230 kV will be considered rather than a non-standard voltage, 93) the line equipment rating will remain at 250 MW because of the electric network limits the need for increasing the line rating (4) the conversion transformers will have an 8% impedance, and (5) the line will be switched on the 115–kV 3-phase side using standard circuit breaker equipment.

For the 2-year testing period, an experimental plan has been prepared to perform tests and analyses to identify future opportunities for economic applications of high phase order transmission lines. The testing program includes: (1) Measurement and statistical analysis of the steady state power frequency parameters including line current unbalance, charging current, shield wire current; (2) measurement of the exciting current and corona loss; (3) measurement of transient and surge parameters under normal line switching and open-ended line conditions; (4) low voltage fault tests, (5) measurement of environmental parameters including audible noise, radio noise, and ground level electric and magnetic fields.

At the conclusion of the testing and operation program, the line will be decommissioned and returned to its original three-phase operation.

Issued in Oak Ridge, Tennessee on July 23, 1991.

Robert E. Lynch,

Acting Director, Procurement and Contracts Division Field Office, Oak Ridge.

[FR Doc. 91–19495 Filed 8–14–91; 8:45 am]

BILLING CODE 6450-01-M

Financial Assistance Award Intent To Award Grant to Energy Concepts Company

AGENCY: Department of Energy.

ACTION: Notice of unsolicited financial assistance award.

SUMMARY: The Department of Energy announces that pursuant to 10 CFR 600.6(a)(2), it is making a discretionary financial assistance award based on acceptance of an unsolicited application meeting the criteria of 10 CFR 600.14(e)(1) to Energy Concepts Company under Grant No. DE–FG01–91CE15404. The proposed grant will provide funding in the estimated amount of $76,470 for Energy Concepts Company to develop and construct a computer model to study the steam-methane reaction in liquid carbonate for the purpose of obtaining the data base for engineering and economic support necessary to proceed to a proof of concept prototype. The National Institute of Standards and Technology (NIST) estimates this new technological concept, once it is developed, will be capable of saving 15,000 barrels of oil daily. This new patented concept, if only 30 percent of the current technologies are replaced with this new technology should be 10 percent more efficient.

The Department of Energy has determined in accordance with 10 CFR 600.14(f) that the application submitted by the Energy Concepts Company is meritorious based on the general evaluation required by 10 CFR 600.14(d)

and that the proposed project represents a unique idea that would not be eligible for financial assistance under a recent, current or planned solicitation.

The proposed project is not eligible for financial assistance under a recent, current or planned solicitation because the funding program, the Energy-Related Inventions Program (ERIP), has been structured since its beginning in 1975 to operate without competitive solicitations because the authorizing legislation directs ERIP to provide support for worthy ideas submitted by the public. The program has never issued and has no plans to issue a competitive solicitation.

The anticipated term of the proposed grant is 24 months from the effective date of award.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Placement and Administration, ATTN: Bernard G. Canlas, PR-322.2, 1000 Independence Avenue SW., Washington, DC 20585.

Scott Sheffield,

Acting Director, Operations Division "B", Office of Placement and Administration.

[FR Doc. 91-19496 Filed 8-14-91; 8:45 am]

BILLING CODE 6450-01-M

Industrial Waste Carbon Dioxide Utilization; Program Interest

AGENCY: Department of Energy.

ACTION: Notice of program interest (NOPI) for cooperative agreement applications.

SUMMARY: The U.S. Department of Energy (DOE), pursuant to the DOE Financial Assistance Rules, 10 CFR 600.15, announces the availability of a Notice of Program Interest No. DE-NP02-91CE40981 for Industrial Waste Carbon Dioxide Utilization.

AVAILABILITY OF THE NOPI: To obtain a copy of the NOPI call the automated telephone service at 708-972-2090, or write to U.S. Department of Energy Field Office, Chicago, 9800 South Cass Avenue, Argonne, Illinois 60439, Attn: Ms. Mary Lou Zambrano, Executive Secretary, Contracts Division.

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy (DOE), Office of Industrial Technologies, is planning to fund research and development of innovative concepts that will utilize waste carbon dioxide (CO_2) produced by or resulting from industrial processes, while conserving energy. Concepts for converting the waste CO_2 to any other form for disposal purposes are not acceptable for funding. The term "innovative concept" is to be interpreted in a very broad sense and includes, but is not limited to: (a) The development of new processes, technologies, materials, or products; (b) the substitution of materials/products; or (c) significant changes to existing industrial processes and operations. The innovative concept may be applicable in more than one industry, enhancing the waste CO_2 utilization and energy savings potential. Proposed concepts must have an annual net energy savings greater than one trillion Btu/year by the year 2010, if implemented on a national scale with an appropriate market penetration.

The following are examples of areas of research and development which might serve as a basis for an application:

1. Application of biotechnology to waste CO_2 utilization. For example, conversion of waste CO_2 to a saleable product.
2. Changes to processing systems to utilize waste CO_2.
3. Development of new products whose manufacture utilizes significant amounts of waste CO_2.

Innovative concepts must be applicable to the industrial sector (SIC 1-39) to be eligible for consideration.

Research and development work may include any or all of (1) exploratory development, (2) engineering development—pilot sale, and (3) engineering development—full scale (including demonstrations). Significant cost sharing (50% or greater) in the project is essential. Participation and/or support by the affected industries is also required.

It is anticipated that several awards, totaling approximately $550,000 of DOE funding, will be made in Fiscal Year (FY) 1992, for initial phase activities, subject to availability of funds. DOE funding in subsequent FY's is expected to total $1,000,000 for each subsequent phase, applied to several projects. The NOPI will be issued on or about September 3, 1991, with complete information on funding, eligibility, application preparation, and evaluation. It will remain open until November 4, 1991, although applications may be submitted at any time before the notice expires. if you are interested in receiving the NOPI, contact the automated telephone service at 708/972-2090 or write to the above address attention Mary Lou Zambrano, Executive Secretary, Contracts Division. All responsible sources may submit an application which will be considered.

Issued in Chicago, Illinois, on August 2, 1991.

Edwin H. Hendricks,

Deputy Assistant Manager for Administration.

[FR Doc. 91-19497 Filed 8-14-91; 8:45 am]

BILLING CODE 6450-01-M

Financial Assistance Award Intent To Award Grant to Power Engineering and Manufacturing, Ltd.

AGENCY: Department of Energy.

ACTION: Notice of unsolicited financial assistance award.

SUMMARY: The Department of Energy announces that pursuant to 10 CFR 600.6(a)(2), it is making a discretionary financial assistance award based on acceptance of an unsolicited application meeting the criteria of 10 CFR 600.14(e)(1) to Power Engineering and Manufacturing Ltd., under Grant No. DE-FG01-91CE15002. The proposed grant will provide funding in the estimated amount of $99,599 for Power Engineering and Manufacturing Ltd., to design, build, and test their patented infinitely variable speed transmission for automobiles. Mr. Saul Herscovici, the inventor, holds two U.S. patent applications on various elements of this variable speed transmission system. The distinctive feature—its rigid power ring instead of a flexible belt—has the potential to transit higher torques and thus allows its use on larger automobiles, therefore adding to the national energy resources.

The Department of Energy has determined in accordance with 10 CFR 600.14(f) that the application submitted by the Power Engineering and Manufacturing Ltd., is meritorious based on the general evaluation required by 10 CFR 600.14(d) and that the proposed project represents a unique idea that would not be eligible for financial assistance under a recent, current or planned solicitation.

The proposed project is not eligible for financial assistance under a recent, current or planned solicitation because the funding program, the Energy-Related Inventions Program (ERIP), has been structured since its beginning in 1975 to operate without competitive solicitations because the authorizing legislation directs ERIP to provide support for worthy ideas submitted by the public. The program has never issued and has no plans to issue a competitive solicitation.

The anticipated term of the proposed grant is 18 months from the effective date of award.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Placement and Administration, ATTN: Bernard G. Canlas, PR-322.2, 1000 Independence Avenue, SW., Washington, DC 20585.

Scott Sheffield,

Acting Director, Operations Division "B" Office of Placement and Administration.

[FR Doc. 91-19493 Filed 8-14-91; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. EC91-18-000 and ES91-48-000]

Baltimore Refuse Energy Systems Company, Limited Partnership; Application for Disclaimer of Jurisdiction or Authorization

August 9, 1991.

Take notice that on August 6, 1991, Baltimore Refuse Energy Systems Company, Limited Partnership (BRESCO) submitted for filing, pursuant to rule 204 of the Commission's Rules of Practice and Procedure, 18 CFR 385.204, an application requesting disclaimer of jurisdiction under sections 203 and 204 of the Federal Power Act, or authorization under sections 203 and 204 of the Federal Power Act and waiver of parts 33 and 34 of the Commission's regulations to the extent necessary, with respect to BRESCO's proposed refinancing of the solid waste disposal and electric power generation facility operated by BRESCO in Baltimore, Maryland. The refinancing will involve the same sale and leaseback arrangement approved by the Commission on September 30, 1987, 40 FERC ¶ 61,366, but will result in a reduction in the bond interest rate and rental payments under that arrangement.

Any person desiring to be heard or to protest said application should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before August 30, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-19402 Filed 8-14-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TA91-1-63-001, TQ91-10-63-000]

Carnegie Natural Gas Co.; Proposed Changes in FERC Gas Tariff

August 8, 1991.

Take notice that on August 2, 1991, Carnegie Natural Gas Company ("Carnegie") tendered for filing the following substitute revised tariff sheets to its FERC Gas Tariff, Second Revised Volume No. 1:

Sub Seventeenth Revised Sheet No. 8
Sub Seventeenth Revised Sheet No. 9

Carnegie states that, pursuant to § 154.305(c)(4) of the Commission's regulations, it is updating its Annual PGA filed on July 2, 1991, in Docket No. TA91-1-63-000, to reflect rate changes subsequently implemented by its pipeline supplier, Texas Eastern Transmission Corporation. The revised rates are proposed to become effective September 1, 1991, and reflect the following changes from Carnegie's last fully-supported PGA filing in Docket No. TQ91-9-63: A $0.0294 per Dth increase in the demand component of its sales rates under its LVWS and CDS rate schedules; a $0.1446 per Dth increase in the commodity component of its sales rates under its LVWS and CDS rate schedules; a $0.1456 per Dth increase in the commodity charge under Rate Schedule LVIS; and a $0.0008 per Dth increase in the DCA component of its sales rates under its LVWS and CDS rate schedules.

Carnegie states that copies of its filing were served on all of its jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.211 and 385.214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before August 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-19403 Filed 8-14-91; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 8488-005 California]

Cosumnes River Water and Power Authority, Surrender of Preliminary Permit

August 8, 1991.

Take notice that the Cosumnes River Water and Power Authority, Permittee for the Cosumnes River Water and Power Project No. 8488, has requested that its preliminary permit be terminated. The preliminary permit for Project No. 8488 was issued April 27, 1990, and would have expired March 31, 1993. The project would have been located on the North, South, and Middle Forks and main stem of the Cosumnes River and on Antelope and Mill Creeks in Amador and El Dorado Counties, California.

The Permittee filed the request on July 19, 1991, and the preliminary permit for Project No. 8488 shall remain in effect through the thirtieth day after issuance of this notice unless that day is a Saturday, Sunday or holiday as described in 18 CFR 385.2007, in which case the permit shall remain in effect through the first business day following that day. New applications involving this project site, to the extent provided for under 18 CFR part 4, may be filed on the next business day.

Lois D. Cashell,

Secretary.

[FR Doc. 91-19407 Filed 8-14-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP90-86-004]

MIGC, Inc.; Compliance Filing

August 8, 1991.

Take notice that on August 6, 1991 MIGC, Inc. (MIGC), suite 230, 12200 North Pecos Street, Denver, Colorado 80234 tendered for filing the following tariff sheets:

Original Volume No. 1

Sub Fifty-Eighth Revised Sheet No. 32
Sub Fifty-Ninth Revised Sheet No. 32
Sixtieth Revised Sheet No. 32
Second Revised Sheet No. 267
Third Revised Sheet No. 269
Second Revised Sheet No. 274
Third Revised Sheet No. 277
Second Revised Sheet No. 284
Second Revised Sheet No. 292
Second Revised Sheet No. 318

Second Revised Sheet No. 319
Second Revised Sheet No. 325
Second Revised Sheet No. 331
Second Revised Sheet No. 338

MIGC states that the above-listed tariff sheets are submitted in compliance with Article II of the settlement approved in the above-captioned docket by Commission order dated June 5, 1991. MIGC further states that a copy of its filing has been served on all parties in this docket.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before August 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 91-19408 Filed 8-14-91; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. CP89-1281-015]

Natural Gas Pipeline Company of America, Changes in Tariff

August 8, 1991.

Take notice that on July 31, 1991, Natural Gas Pipeline Company of America (Natural) submitted for filing the below listed tariff sheets to be a part of its FERC Gas Tariff, Third Revised Volume No. 1, to be effective on their indicated effective dates:

Effective

Second Substitute Sixty-Second Revised Sheet No. 5: 12/01/90
Second Substitute Sixty-Third Revised Sheet No. 5A: 01/01/91
First Revised Sixty-Fourth Revised Sheet No. 5A: 04/26/91

Natural states that the tariff sheets are submitted in compliance with the Commission's Letter Order issued July 11, 1991, at Docket No. CP89-1281-011 (Order). The tariff sheets reflect the Gas Inventory Charge for Rate Schedules WS-1 and WS-2 as set forth by the Order.

Natural requested waiver of the Commission's Regulations to the extent necessary to permit the tariff sheets to become effective on their indicated effective dates.

Natural states that a copy of the filing is being mailed to Natural's jurisdictional customers and interested state regulatory agencies, and all parties set out on the official service lists at Docket Nos. CP89-1281-000 and TA90-1-26-000.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before August 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 91-19404 Filed 8-14-91; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. RP90-192-007]

Texas Gas Transmission Corp.; Proposed Changes in FERC Gas Tariff

August 8, 1991.

Take notice that on August 5, 1991 Texas Gas Transmission Corporation (Texas Gas) tendered for filing the following tariff sheet to its FERC Gas Tariff, First Revised Volume No. 2-A:

Original Sheet No. 49C

On May 28, 1991, Texas Gas Transmission Corporation (Texas Gas) tendered for filing tariffs sheets to its First Revised Volume No. 2-A in compliance with a Federal Energy Regulatory Commission (Commission) Letter Order issued March 7, 1991, in the referenced Docket. This filing was accepted to be effective June 1, 1991, by Commission Letter Order issued July 18, 1991. Texas Gas inadvertently omitted Original Sheet No. 49C from its filing, which contains § 1.6 and the beginning of § 2.1 of Texas Gas's IT Rate Schedule. The contents of this sheet have been previously approved by the Commission. Therefore, this filing is being made to incorporate Original Sheet No. 49C as part of Texas Gas's First Revised Volume No. 2-A tariff.

Texas Gas states that copies of the revised tariff sheets are being mailed to Texas Gas's jurisdictional customers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before August 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 91-19405 Filed 8-14-91; 8:45 am]
BILLING CODE 6717-01-M

[Docket No. RP-91-177-001]

Wyoming Interstate Company, Ltd.; Tariff Filing

August 8, 1991.

Take Notice that Wyoming Interstate Company, Ltd. ("WIC"), on August 5, 1991, tendered for filing certain revised tariff sheets to its FERC Gas Tariff, Original Volume No. 2, to be effective July 1, 1991.

WIC states that this filing complies with the July 19, 1991, Commission order in Docket No. RP91-177. The Commission's July 19, 1991, order accepted WIC's Original Volume No. 2 Tariff allowing WIC to provide transportation under section 311 of the Natural Gas Policy Act, subject to WIC making certain modifications to its tariff. WIC states that this filing complies with that requirement.

WIC states that copies of this filing were served upon all parties in Docket No. RP91-177 and all shippers requesting section 311 service, as well as interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before August 15, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 91-19406 Filed 8-14-91; 8:45 am]
BILLING CODE 6717-01-M

Office of Hearings and Appeals

Notice of Cases Filed During the Week of July 26 Through August 2, 1991

During the week of July 26 through August 2, 1991, the appeals and applications for exception or other relief listed in the Appendix to this Notice were filed with the Office of Hearings and Appeals of the Department of Energy.

Under DOE procedural regulations, 10 CFR part 205, any person who will be aggrieved by the DOE action sought in these cases may file written comments on the application within ten days of service of notice, as prescribed in the procedural regulations. For purposes of the regulations, the date of service of notice is deemed to be the date of publication of this Notice or the date of receipt by an aggrieved person of actual notice, whichever occurs first. All such comments shall be filed with the Office of Hearings and Appeals, Department of Energy, Washington, DC 20585.

Dated: August 9, 1991.

Richard T. Tedrow,

Acting Director, Office of Hearings and Appeals.

List of Cases Received By the Office of Hearings and Appeals

[Week of July 26 through Aug. 2, 1991]

Date	Name and location of applicant	Case No.	Type of submission
July 29, 1991	Gulf/Black Eagle Gulf, Atlantic Beach, Florida	RR300–95	Request for modification/rescission in the Gulf refund proceeding. If granted: The March 29, 1991 Decision and Order (Case No. RF300–12177) issued to Black Eagle Gulf would be modified regarding the firm's application for refund submitted in the Gulf refund proceeding.
Do	Gulf/Blowing Rock Gulf, Atlantic, Florida	RR300–97	Request for modification/rescission in the Gulf refund proceeding. If Granted: The March 29, 1991 Decision and Order (Case No. RF300–12270) issued to Blowing Rock Gulf would be modified regarding the firm's application for refund submitted in the Gulf refund proceeding.
Do	Gulf/T.L. "Jake" Ferguson's Gulf, Atlantic, Florida	RR300–96	Request for modification/rescission in the Gulf refund proceeding. If Granted: The March 29, 1991 Decision and Order (Case No. RF300–12148) issued to T.L. "Jake" Ferguson's Gulf would be modified regarding the firm's application for refund submitted in the Gulf refund proceeding.
Do	Harold H. Johnson, Gresham, Oregon	LFA–0139	Appeal of an information request denial. If Granted: The June 28, 1991 Freedom of Information Request Denial issued by the Division of Personnel Management would be rescinded, and Harold H. Johnson would receive access to certain requested records.

Date received	Name of refund proceeding/name of refund application	Case No.
7/25/91	Stockton Skelgas	RF340–6.
7/29/91	McDonnell Douglas Corporation.	RF272–128.
7/29/91	Rural Parish Workers of Christ.	RF335–37.
7/30/91	Farmers Union Oil Company.	RC272–129.
7/30/91	Hayes-Albion Corporation.	RC272–130.
7/30/91	NGL Supply, Inc.	RF340–7.
7/31/91	Hillcrest Garden Inc.	RF341–2.
7/31/91	Tauber Oil Co	RF325–8.
8/1/91	Zuks 66 Auto Center.	RF341–3.
8/1/91	BOS L.P. Gas	RF340–8.
8/1/91	Liquid Petroleum Corp.	RF340–9.
8/1/91	Holy Name Hospital.	RF336–22.
8/1/91	City of Jefferson City, Et al.	RC272–131.
8/1/91	PPG Industries, Inc.	RA272–42.
8/1/91	Columbia County School System.	RA272–43.
8/2/91	P&O Falco, Inc	RF326–313.
8/2/91	UPG, Inc	RF326–314.
7/26/91 thru 8/2/91.	Texaco Refund applications received.	RF321–16317 thru RF321–16337.
7/26/91 thru 8/2/91.	Atlantic Richfield Applications received.	RF304–12361 thru RF304–12384.
7/26/91 thru 8/2/91.	Crude Oil applications received.	RF272–89517 thru RF272–89537.
7/26/91 thru 8/2/91.	Gulf Oil Refund applications received.	RF300–17302 thru RF300–17386.

[FR Doc. 91–19494 Filed 8–14–91; 8:45am]

BILLING CODE 6450–01–M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, Department of Energy.

ACTION: Notice of implementation of special refund procedures.

SUMMARY: The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the procedures for disbursement of $3,624,920, plus accrued interest, of crude oil overcharge funds obtained by the DOE under the terms of consent order agreements entered into by Kern Oil & Refinery, Erickson Refining Corporation, and Bill J. Graham (Case Nos. LEF–0022, LEF–0023 and LEF–0024). The consent orders resolve allegations of crude oil pricing violations by the firms.

DATES AND ADDRESSES: Applications for Refund from the crude oil fund must be filed in duplicate and must be received by June 30, 1992. All applications should refer to the subpart V Crude Oil Overcharge Refund proceeding and should be addressed to the Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585. Parties that have previously submitted a refund application in a crude oil refund proceeding need not file another application; their initial application will be deemed to be filed in all crude oil proceedings finalized to date.

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–2861.

SUPPLEMENTARY INFORMATION: In accordance with the procedural regulations of the Department of Energy (DOE), 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order set out below. The Decision concerns the settlement of various allegations regarding crude oil overcharges raised against Kern Oil &

Refinery (Kern), Erickson Refining Corp. (Erickson), and Bill J. Graham (Graham). A Proposed Decision and Order tentatively establishing refund procedures and soliciting comments from the public concerning the distribution of the settlement funds obtained from these parties by the DOE was issued on April 3, 1991. 56 FR 14516 (April 10, 1991).

The Decision establishes procedures and standards which the DOE will use to distribute $3,624,920 remitted by Kern, Erickson and Graham. The funds shall be distributed in accord with the Modified Statement of Restitutionary Policy Concerning Crude Oil Overcharges, which states that crude oil overcharge monies will be divided among the states, the federal government and eligible purchasers of refined petroleum products. See 51 FR 27899 (August 4, 1986). Claims procedures are explained in detail. Applications for Refund will now be accepted provided they are filed in duplicate and received no later than June 30, 1992. Parties that have previously submitted a refund application in a crude oil refund proceeding need not file another application; their initial submission will be deemed to be filed in all crude oil refund proceedings finalized to date.

Dated: August 7, 1991.

Thomas O. Mann,

Acting Director, Office of Hearings and Appeals.

Implementation of Special Refund Procedures

Names of Firms: Kern Oil & Refinery and Larry D. Delpit, Erickson Refining Corporation; Bill J. Graham.
Date of Filings: September 28, 1990, September 28, 1990, October 2, 1990.
Case Numbers: LEF–0022, LEF–0023; LEF–0024.

In accordance with the procedural regulations of the Department of Energy (DOE), 10 CFR part 205, subpart V, the Economic Regulatory Administration (ERA) of the DOE filed petitions for the Implementation of Special Refund Procedures with the Office of Hearings and Appeals (OHA) on September 28, 1990 and October 2, 1990, respectively. In those petitions, the ERA requests that the OHA formulate and implement procedures for the distribution of crude oil overcharge funds received from Kern Oil & Refinery (Kern) and Larry D. Delpit (Delpit), Erickson Refining Corporation (Erickson) and Bill J. Graham (Graham). This Decision and Order establishes procedures for distributing these funds to those injured by actual or alleged violations of the DOE price regulations.

I. Background

On March 31, 1987, the ERA issued a Proposed Remedial Order (PRO) (Case No. KRO–0520) to Kern and Delpit. The PRO alleged that Kern and Delpit committed violations of DOE regulations governing the sale, allocation and classification of crude oil during the period October 1979 through December 1980. The PRO found the respondents liable for $25,042,016 in overcharges. The PRO was being adjudicated by the Office of Hearings and Appeals when, on April 19, 1990, the DOE entered into a Consent Order with Kern and Delpit under the terms of which Kern and Delpit were required to pay $750,000 and $2,600,000, respectively, for a total of $3,350,000 in settlement of all alleged regulatory violations against them. These monies have been deposited in a single, interest bearing escrow account referred to herein as the Kern escrow fund.

Erickson, a crude oil reseller and refiner, was audited by the ERA and subsequently charged with illegal crude oil "layering" in violation of 10 CFR 212.186. The ERA alleged that during the period October 1979 through September 1980 Erickson illegally obtained $1,238,405.84 in crude oil overcharges, and directed that Erickson refund this amount, plus interest. On October 31, 1985, the OHA affirmed the PRO with minor modifications and issued a Remedial Order to Erickson. See Erickson Refining Crop., 13 DOE ¶ 83,045 (1985).

A second PRO was issued to Erickson by the ERA on May 30, 1985. In this PRO, the ERA charged Erickson with manipulating the Entitlements Program, 10 CFR 211.67, in order to receive excessive entitlements benefits for the months of November 1978, August 1979 and October 1979. The OHA upheld the PRO and issued a Remedial Order on October 4, 1985, finding Erickson liable for the repayment of $218,183.16 in excessive entitlements benefits, plus interest. See Erickson Refining Corp., 13 DOE ¶ 83,036 (1985).

Erickson subsequently declared bankruptcy. On May 7, 1990, the U.S. Bankruptcy Court for Southern District of Texas entered an order approving a settlement agreement between Erickson and the DOE regarding Erickson's compliance with the Federal petroleum price and allocation regulations, including those issues involved in the two Remedial Orders discussed above. In accordance with the settlement agreement, Erickson remitted $59,000 to the DOE.

Graham, a crude oil producer, was audited by the ERA for the period September 1, 1973 through February 28, 1977. The ERA issued a PRO to Graham on May 3, 1979. Graham contested the PRO unsuccessfully before the OHA. On March 28, 1980, OHA issued a Remedial Order to Graham which directed him to refund $117,520 in crude oil overcharges, plus interest. See Bill J. Graham, 5 DOE ¶ 83,016 (1980). Graham died without complying with the Remedial Order. In 1988, the DOE and Mr. Graham's widow entered into an agreement to settle the matter for $200,000 plus interest. In accordance with this agreement, $215,920 has been remitted to the DOE. In sum, these parties have remitted a total of $3,624,920 to the DOE.

On April 3, 1991, the OHA issued a consolidated Proposed Decision and Order (PDO) setting forth a tentative plan for the distribution of the Kern, Erickson and Graham escrow fund accounts. In order to give notice to all potentially affected parties, a copy of the PDO was published in the **Federal Register** and comments were solicited. 56 FR 14516 (April 10, 1991). We have received no comments regarding these procedures. In this Decision and Order we will adopt final refund procedures for the distribution of the funds in the Kern, Erickson and Graham escrow accounts.

II. Jurisdiction

The general guidelines which the OHA may use to formulate and implement a plan to distribute refunds are set forth in 10 CFR part 205, subpart V. The subpart V process may be used in situations where the DOE cannot readily identify the persons who may have been injured as a result of actual or alleged violations of the regulations or ascertain the amount of the refund each person should receive. See Office of Enforcement, 9 DOE ¶ 82,508 at 85,046-049 (1981) (discussing Subpart V and the authority of the OHA to fashion procedures to distribute refunds). See also Office of Enforcement, 8 DOE ¶ 82,597 at 85,398 (1981). As we stated in the PDO, we have reviewed the records in these cases and have determined that a subpart V proceeding is an appropriate mechanism for distributing the escrow funds. We will therefore grant the ERA's petitions and assume jurisdiction over these funds.

III. Crude Oil Overcharge Refund Procedures

On July 28, 1986, the DOE issued a Modified Statement of Restitionary Policy Concerning Crude Oil Overcharges, 51 FR 27899 (August 4, 1986) ("the MSRP"). The MSRP, issued as a result of a court-approved Settlement Agreement in *In re: The Department of Energy Stripper Well Exemption Litigation,* M.D.L. No. 378 (D. Kan.), provides that crude oil overcharge funds will be divided among the states, the federal government, and injured purchasers of refined petroleum products. Under the MSRP, up to 20 percent of these crude oil overcharge funds will be reserved initially to satisfy valid claims by injured purchasers of petroleum products. Eighty percent of the funds, and any monies remaining after all valid claims are paid, are to be disbursed equally to the states and federal government for indirect restitution.

The OHA has been applying the MSRP to all subpart V proceedings involving alleged crude oil violations. See Order Implementing the MSRP, 51 FR 29689 (August 20, 1986). That Order provided a period of 30 days for the filing of any objections to the application of the MSRP, and solicited comments concerning the appropriate procedures to follow in processing refund applications in crude oil refund proceedings.

On April 6, 1987, the OHA issued a Notice analyzing the numerous comments which it received in response to the August 1986 Order. 52 FR 11737 (April 10, 1987) (the April 1987 Notice). The Notice set forth generalized procedures and provided guidance to assist claimants that wish to file refund applications for crude oil monies under the subpart V regulations. All applicants for refunds would be required to document their purchase volumes of petroleum products

during the period of price controls and to prove that they were injured by the alleged overcharges. The Notice indicated that end-users of petroleum products whose businesses are unrelated to the petroleum industry would be presumed to have absorbed the crude oil overcharges, and need not submit any further proof of injury to receive a refund. Finally, we stated that refunds would be calculated on the basis of a per gallon refund amount derived by dividing crude oil violation amounts by the total consumption of petroleum products in the United States during the period of price controls. The numerator would include the crude oil overcharge monies that were in the DOE's escrow account at the time of the settlement and a portion of the funds in the M.D.L. 378 escrow at the time of the settlement.

The DOE has applied these procedures in numerous cases since the April 1987 Notice. See e.g., Amorient Petroleum Company, California, 18 DOE ¶ 85,595, (1989); New York Petroleum, Inc., 18 DOE ¶ 85,435 (1988); Shell Oil Co., 17 DOE ¶ 85,204 (1988) (Shell Oil); Ernest A. Allerkamp, 17 DOE ¶ 85,079 (1988) (Allerkamp). These procedures have been approved by the United States District Court for the District of Kansas and the Temporary Emergency Court of Appeals (TECA). Various States had filed a Motion with the District Court, claiming that the OHA violated the Stripper Well Settlement Agreement by employing presumptions of injury for end-users and by improperly calculating the refund amount to be used in those proceedings. On August 17, 1987, Judge Theis issued an Opinion and Order denying the States' Motion in its entirety. The court concluded that the M.D.L. 378 Settlement Agreement "does not bar OHA from permitting claimants to employ reasonable presumptions in affirmatively demonstrating injury entitling them to a refund." *In re:* The Department of Energy Stripper Well Exemption Litigation, 671 F. Supp. 1318, 1323 (D. Kan. 1987). The court also ruled that, as specified in the April 1987 Notice, the OHA could calculate refunds based on a portion of the M.D.L. 378 overcharges. *id.* at 1323-24. The States appealed the latter ruling. In affirming Judge Theis' decision, the TECA found that, "It is clear that OHA is only creating a formula for calculating the proper allocation of funds in the overcharge escrow accounts which were specifically reserved by the Settlement for subpart V claimants." *In Re:* The Department of Energy Stripper Well Exemption Litigation, 857 F.2d 1481, 1484 (Temp. Emer. Ct. App. 1988). This the Court concluded was a reasonable and a rational choice well within OHA's authority.

IV. Final Refund Procedures

A. Refund Claims

As discussed in the PDO, we shall apply the procedures outlined in the April 1987 Notice to the crude oil subpart V proceedings that are the subject of the present determination. As noted above, $3,624,920 in alleged crude oil violation amounts is covered by this Decision. We have decided to reserve initially the full 20 percent of the alleged crude oil violation amounts, or $724,984 (plus interest), for direct refunds to claimants, in order to ensure that sufficient funds will be available for refunds to injured parties. The amount of the reserve may be adjusted downward later if circumstances warrant.

The process which the OHA will use to evaluate claims based on alleged crude oil violations will be modeled after the process the OHA has used in subpart V proceedings to evaluate claims based upon alleged overcharges involving refined products. See *MAPCO, Inc.*, 15 DOE ¶ 85,097 at 88,191–92 (1986); *Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 at 88,869 (1986) (*Mountain Fuel*). As in non-crude oil cases, applicants will be required to document their purchase volumes and to prove that they were injured as a result of the alleged violations. Following Subpart V precedent, reasonable estimates of purchase volumes may be submitted. See *Greater Richmond Transit Co.*, 15 DOE ¶ 85,028 at 88,050 (1986). Generally, it is not necessary for applicants to identify their suppliers of petroleum products in order to receive a refund.

As we noted in the PDO, applicants who were end-users or ultimate consumers of petroleum products, whose businesses are unrelated to the petroleum industry, and who were not subject to the DOE price regulations are presumed to have absorbed rather than passed on alleged crude oil overcharges. In order to receive a refund, end-users need not submit any further evidence of injury beyond volumes of product purchased during the period of crude oil price controls. See *A. Tarricone, Inc.*, 15 DOE ¶ 85,495 at 88,893–96 (1987) (*A. Tarricone*). The end-user presumption of injury, however, is rebuttable. *Berry Holding Co.*, 16 DOE ¶ 85,405 at 88,797 (1987). If an interested party submits specific evidence which is of sufficient weight to cast serious doubt on whether a particular refund applicant was actually injured, and thus ineligible for the application of the end-user presumption, that individual applicant will be required to produce further evidence of injury.

Also, as outlined in the PDO, reseller and retailer claimants must submit detailed evidence of injury, and may not rely on the presumptions of injury utilized in refund cases involving refined petroleum products. See *A. Tarricone*, 15 DOE at 88,896. They can, however, use econometric evidence of the type employed in the OHA Report to the District Court in the Stripper Well Litigation, 6 Fed. Energy Guidelines ¶ 90,507 (June 19, 1985). Applicants who received a crude oil refund pursuant to one of the escrows established in the Settlement Agreement have waived their rights to apply for crude oil refunds under subpart V. See *Mid-America Dairymen* v. *Herrington*, 704 F. Supp. 198 (D. Kan. 1988), *aff'd*, 878 F.2d 1448 (Temp. Emer. Ct. Ap. (1989)).

Refunds to eligible claimants who purchased refined petroleum products will be calculated on the basis of a volumetric refund amount derived by dividing the crude oil violation amounts involved in this determination ($3,624,920) by the total consumption of petroleum products in the United States during the period of price controls (2,020,997,335,000 gallons). See *Mountain Fuel*, 14 DOE at 88,868. This approach reflects the fact that crude oil overcharges were spread equally throughout the country by the Entitlements Program.[1] This yields a volumetric refund amount of $0.0000017936 per gallon.

As we stated in previous Decisions, a crude oil refund applicant will be required to submit only one application for crude oil overcharge funds. See *Allerkamp*, 17 DOE at 88,176. Any party that has previously submitted a refund application in crude oil refund proceedings need not file another application; that application will be deemed to be filed in all crude oil proceedings finalized to date. In the PDO we proposed to establish a filing deadline of June 30, 1992 for refund applications submitted in this proceeding. That filing deadline shall be adopted. It is the policy of the DOE to pay all crude oil refund claims filed before June 30, 1992 at the rate of $0.0008 per gallon. However, while we anticipate that applicants which filed their claims by June 30, 1988 will receive a supplemental refund payment, we will decide in the future whether claimants that filed later Applications should receive additional refunds. see, e.g., *Hebrew Rehabilitation Center for the Aged*, 21 DOE ¶ 85,148 (1991).

To apply for a crude oil refund, an applicant should submit an Application for Refund. That application should contain all of the following information:

(1) Identifying information including the applicant's name, address, and social security number or employer identification number, and indication whether the applicant is a corporation, the name and telephone number of a person to contact for any additional information, and the name and address of the persons who should receive the refund check;

(2) A short description of the applicant's business and how it used petroleum products. If the applicant did business under more than one name or a different name during the period of price controls, the applicant should list these names;

(3) If the applicant's firm is owned by another company, or owns other companies, a list of those other companies' names and their relationships to the applicant firm;

(4) A statement identifying the petroleum products which the applicant purchased during the period August 19, 1973 through January 27, 1981, the number of gallons of each product purchased on an annual basis, and the total number of gallons for all products purchased on which the applicant bases its claim;

(5) An explanation of how the applicant obtained the volume figures above, and an explanation of its method of estimation if the

[1] The Department of Energy established the Entitlements Program to equalize access to the benefits of crude oil price controls among all domestic refiners and their downstream customers. To accomplish this goal, refiners were required to make transfer payments among themselves through the purchase and sale of "entitlements." This balancing mechanism had the effect of evenly disbursing overcharges resulting from crude oil miscertifications throughout the domestic refining industry. See *Amber Refining Inc.*, 13 DOE ¶ 85,217 at 88,564 (1985).

applicant used estimates to determine its purchase volumes;

(6) A statement that neither the applicant, its parent firm, affiliates, subsidiaries, successors nor assigns has waived any right it may have to receive a refund in these cases (e.g., by having executed and submitted a valid waiver pursuant to any one of the escrow accounts established pursuant to the Stripper Well Agreement).

(7) If the applicant is not an end-user whose business is unrelated to the petroleum industry, a showing that the applicant was injured by the alleged overcharges, and

(8) If the applicant is a regulated utility, a certification that it will notify the state utility commission or other regulatory agency of any refunds received, and that it will pass on the entirety of its refund to its customers.

All applications should be either typed or printed and clearly labeled "Application for Crude Oil Refund." Each applicant must submit an original and one copy of the application to: Subpart V Crude Oil Overcharge Refunds, Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

Although an applicant need not use any special application form to apply for a crude oil refund, a suggested form has been prepared by the OHA and may be obtained by sending a written request to the address listed above.

B. Payments to the States and Federal Government

As proposed in the PDO, we shall comply with the terms of the MSRP and disburse the remaining 80 percent of the alleged crude oil violation amounts subject to this Decision, or $2,899,936 plus interest, in equal shares to the states and federal government for indirect restitution. Refunds to the states will be in proportion to the consumption of petroleum products in each state during the period of price controls. The share or ratio of the funds which each state will receive is contained in Exhibit H of the M.D.L. 378 Settlement Agreement. Also as proposed in the PDO, these funds will be subject to the same limitations and reporting requirements as all other crude oil monies received by the states under the Settlement Agreement.

It Is Therefore Ordered That:

(1) Applications for Refund from the crude oil overcharge funds remitted to the Department of Energy by Kern Oil & Refinery, Erickson Refining Corp., and Bill J. Graham may now be filed.

(2) All applications submitted pursuant to Paragraph (1) must be filed no later than June 30, 1992.

(3) The Director of Special Accounts and Payroll, Office of Departmental Accounting and Financial Systems Development, Office of the Controller, Department of Energy shall take all steps necessary to transfer, pursuant to paragraphs (4), (5), and (6) below, all of the funds from the following subaccounts: Kern Oil & Refinery, No. 650S00378Z; Erickson Refinery Corp., No. 650X00352Z; Bill J. Graham, No. 670C00303Z.

(4) The Director of Special Accounts and Payroll shall transfer $1,449,968 (plus accrued interest) of the funds obtained pursuant to paragraph (3) above, into the subaccount denominated "Crude Tracking-States" Account No. 999DOE003W.

(5) The Director of Special Accounts and Payroll shall transfer $1,449,968 (plus accrued interest) of the funds obtained pursuant to paragraph (3) above, into the subaccount denominated "Crude Tracking-Federal" Account No. 999DOE002W.

(6) The Director of Special Accounts and Payroll shall transfer $724,984 (plus accrued interest) of the funds obtained pursuant to paragraph (3) above, into the subaccount denominated "Crude Tracking-Claimants 3," Account No. 999DOE009Z.

Dated: August 7, 1991.

George B. Breznay,

Director, Office of Hearings and Appeals.

[FR Doc. 91-19504 Filed 8-14-91; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPP-180848; FRL 3935-2]

Receipt of Application for Emergency Exemption to Use Fenpropathrin; Solicitation of Public Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received a specific exemption request from the Texas Department of Agriculture (hereafter referred to as the "Applicant") to use the pesticide fenpropathrin (CAS 39515-41-8) to treat 50,000 acres of cotton fields to control the sweet potato whitefly.

The Applicant proposes the use of a new chemical; therefore, in accordance with 40 CFR 166.24, EPA is soliciting public comment before making the decision whether or not to grant the exemption.

DATES: Comments must be received on or before August 30, 1991.

ADDRESSES: Three copies of written comments, bearing the identification notation "OPP-180848," should be submitted by mail to: Public Docket and Freedom of Information Section, Field Operations Division (H7506C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA.

Information submitted in any comment concerning this notice may be claimed confidential by marking any part or all of that information as "Confidential Business Information." Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain Confidential Business Information must be provided by the submitter for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. All written comments filed pursuant to this notice will be available for public inspection in rm. 1128, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Jim Tompkins, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 716, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-4359).

SUPPLEMENTARY INFORMATION: Pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C. 136p), the Administrator may, at his discretion, exempt a State agency from any registration provision of FIFRA if he determines that emergency conditions exist which require such exemption. The Applicant has requested the Administrator to issue a specific exemption for the use of Tame 2.4 EC Spray (fenpropathrin) on cotton to control the sweet potato whitefly. Information in accordance with 40 CFR part 166 was submitted as part of this request.

The Applicant states that in 1990 cotton growers in the Lower Rio Grande Valley (LRGV) began to experience significant crop losses due to infestation by the sweet potato whitefly. Observations made in the current (1991) season's cotton crop indicate that the sweet potato whitefly infestations are as much as 4 to 6 weeks ahead of the worst 1990 infestations. Producers in the LRGV feel they are not receiving adequate control with currently registered products. The Applicant is requesting the use of fenpropathrin to provide suppression of the sweet potato whitefly. The Applicant has indicated that without the use of fenpropathrin to control the sweet potato whitefly, the reduction in quality of cotton and added insecticide costs will cause a loss of $9,361,500 in revenues for cotton growers in the LRGV.

Tame 2.4 EC Spray will be applied at the maximum rate of 4 pints per acre per growing season on 50,000 acres of cotton. This amounts to 20,000 gallons of product, or 48,000 pounds of active ingredient. The product will not be

applied within 21 days of harvest. This is the first year that the Applicant has applied for the use of fenpropathrin on cotton.

This notice does not constitute a decision by EPA on the application itself. The regulations governing section 18 require publication of a notice of receipt of an application for a specific exemption proposing use of a new chemical (i.e., an active ingredient not contained in any currently registered pesticide). Such notice provides for the opportunity for public comment on the application. Accordingly, interested persons may submit written views on this subject to the Field Operations Division at the address above.

The Agency, accordingly, will review and consider all comments received during the comment period in determining whether to issue the emergency exemption requested by the Florida Department of Agriculture and Consumer Services.

Dated: August 4, 1991.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 91–19486 Filed 8–14–91; 8:45 am]

BILLING CODE 6560–50–F

[OPTS–44574; FRL 3940–7]

TSCA Chemical Testing; Receipt of Test Data

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the receipt of test data on octamethylcyclotetrasiloxane (OMCTS) (CAS No.556–67–2), submitted pursuant to a consent order under the Toxic Substances Control Act (TSCA). Publication of this notice is in compliance with section 4(d) of TSCA.

FOR FURTHER INFORMATION CONTACT: David Kling, Acting Director, Environmental Assistance Division (TS–799), Office of Toxic Substances, Environmental Protection Agency, rm. E–543B, 401 M St., SW., Washington, DC 20460, (202) 554–1404, TDD (202) 554–0551.

SUPPLEMENTARY INFORMATION: Under 40 CFR 790.60, all TSCA section 4 consent orders contain a statement that results of testing conducted pursuant to these testing consent orders will be announced to the public in accordance with section 4(d).

I. Test Data Submissions

Test data for OMCTS were submitted by the Silicones Health Council pursuant to a consent order at 40 CFR 799.5000. They were received by EPA on July 19, 1991. The submission describes a bioconcentration and elimination of ^{14}C-residues by fathead minnows *Pimephales promelas* exposed to OMCTS. Environmental effects testing is required by this consent order. This chemical is used as an intermediate in the production of polydimethylsiloxane.

EPA has initiated its review and evaluation process for these data submissions. At this time, the Agency is unable to provide any determination as to the completeness of the submissions.

II. Public Record

EPA has established a public record for this TSCA section 4(d) receipt of data notice (docket number OPTS–44574). This record includes copies of all studies reported in this notice. The record is available for inspection from 8 a.m. to 12 noon, and 1 p.m. to 4 p.m., Monday through Friday, except legal holidays, in the TSCA Public Docket Office, rm. NE–G004, 401 M St., SW., Washington, DC 20460.

Authority: 15 U.S.C. 2603.

Dated: August 8, 1991.

Charles M. Auer,

Director, Existing Chemical Assessment Division, Office of Toxic Substances.

[FR Doc. 91–19483 Filed 8–14–91; 8:45 am]

BILLING CODE 6560–50–F

[PP 8G3571/T615; FRL 3936–6]

Triclopyr; Renewal of Temporary Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has renewed temporary tolerances for the combined residues of the herbicide triclopyr and its metabolites in or on certain raw agricultural commodities.

DATES: These temporary tolerances expire June 19, 1993.

FOR FURTHER INFORMATION CONTACT: By mail: Robert Taylor, Product Manager (PM) 25, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 245, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, 703–557–1800.

SUPPLEMENTARY INFORMATION: In response to a pesticide petition (PP 8G3571) from the Dow Chemical Co., P.O. Box 1706, Midland, MI 48640, EPA issued a notice in the **Federal Register** of September 14, 1988 (53 FR 35554) announcing that temporary tolerances had been established for the combined residues of the herbicide triclopyr (3,5,6-trichloro-2-pyridinyloxyacetic acid) and its metabolites 3,5,6-trichloro-2-pyridinol and 2-methoxy-3,5,6-trichloropyridine in or on the raw agricultural commodities rice grain at 0.5 part per million (ppm) and rice straw at 8.0 ppm, and for triclopyr in poultry meat, fat, and meat byproducts (except kidney) at 0.2 ppm, poultry kidney at 1.0 ppm, and eggs at 0.3 ppm. These tolerances are being renewed under PP 8G3571 and experimental use permit 62719–EUP–8, submitted by DowElanco, Quad IV, 9002 Purdue Rd., Indianapolis, IN 46268.

The company has requested a 1-year renewal of the temporary tolerances to permit the continued marketing of the above raw agricultural commodities when treated in accordance with the provisions of the experimental use permit 62719–EUP–8, which is being renewed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 95–396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that renewal of the temporary tolerances will protect the public health. Therefore, the temporary tolerances have been renewed on the condition that the herbicide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active herbicide to be used must not exceed the quantity authorized by the experimental use permit.
2. DowElanco must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

These tolerance expire June 19, 1993. Residues not in excess of this amount remaining in or on the above raw agricultural commodities after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerances. These tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate

that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

Authority: 21 U.S.C. 346a(j).

Dated: August 4, 1991.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 91–19485 Filed 8–14–91; 8:45 am]

BILLING CODE 6560-50-F

[PP 6G3306/T616; FRL 3936–7]

Triclopyr; Renewal of Temporary Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has renewed temporary tolerances for the combined residues of the herbicide triclopyr and its metabolites in or on certain raw agricultural commodities.

DATES: These temporary tolerances expire June 11, 1993.

FOR FURTHER INFORMATION CONTACT: By mail: Robert Taylor, Product Manager (PM) 25, Registration Division (H7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 245, CM#2, 1921 Jefferson Davis Highway, Arlington, VA, 703–557–1800.

SUPPLEMENTARY INFORMATION: In response to a pesticide petition (PP 6G3306) from the Dow Chemical Co., Agricultural Products Depts., P.O. Box 1706, Midland, MI 48640, EPA issued a notice in the Federal Register of September 14, 1988 (53 FR 35554) announcing that temporary tolerances had been established for the combined residues of the herbicide triclopyr (3,5,6-trichloro-2-pyridinyloxyacetic acid) and its metabolites 3,5,6-trichloro-2-pyridinol and 2-methoxy-3,5,6-trichloropyridine in or on the raw agricultural commodities fish at 0.2 part per million (ppm) and shellfish at 0.2 ppm. An allowable residue level of 0.5 ppm in potable water is renewed in compliance with the Safe Drinking Water Act (SDWA). These tolerances are being renewed under PP 6G3306 and experimental use permit 62719–EUP–1, submitted by DowElanco, Quad IV, 9002 Purdue Rd., Indianapolis, IN 46268.

The company has requested a 2-year renewal of the temporary tolerances to permit the continued marketing of the above raw agricultural commodities when treated in accordance with the provisions of the experimental use permit 62719–EUP–8, which is being renewed under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as amended (Pub. L. 95–396, 92 Stat. 819; 7 U.S.C. 136).

The scientific data reported and other relevant material were evaluated, and it was determined that renewal of the temporary tolerances will protect the public health. Therefore, the temporary tolerances have been renewed on the condition that the herbicide be used in accordance with the experimental use permit and with the following provisions:

1. The total amount of the active herbicide to be used must not exceed the quantity authorized by the experimental use permit.

2. DowElanco must immediately notify the EPA of any findings from the experimental use that have a bearing on safety. The company must also keep records of production, distribution, and performance and on request make the records available to any authorized officer or employee of the EPA or the Food and Drug Administration.

These tolerance expire June 11, 1993. Residues not in excess of this amount remaining in or on the above raw agricultural commodities after this expiration date will not be considered actionable if the pesticide is legally applied during the term of, and in accordance with, the provisions of the experimental use permit and temporary tolerances. These tolerances may be revoked if the experimental use permit is revoked or if any experience with or scientific data on this pesticide indicate that such revocation is necessary to protect the public health.

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12291.

Pursuant to the requirements of the Regulatory Flexibility Act (Pub. L. 96–354, 94 Stat. 1164, 5 U.S.C. 601–612), the Administrator has determined that regulations establishing new tolerances or raising tolerance levels or establishing exemptions from tolerance requirements do not have a significant economic impact on a substantial number of small entities. A certification statement to this effect was published in the Federal Register of May 4, 1981 (46 FR 24950).

Authority: 21 U.S.C. 346a(j).

Dated: August 4, 1991.

Anne E. Lindsay,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 91–19484 Filed 8–14–91; 8:45 am]

BILLING CODE 6560-50-F

[FRL-3984-3]

Extension of the Period for Action on a Proposed Determination To Withdraw or Restrict the Specification Of an Area for Use as a Disposal Site; Kuparuk River Unit, North Slope Borough, AK

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of an extension of the period for Regional action on a proposed section 404(c) determination.

SUMMARY: On May 14, 1991, EPA Region X published notice in the Federal Register of a Proposed Determination pursuant to section 404(c) of the Clean Water Act (33 U.S.C. 1344(c)). EPA Region X also retained a consultant to analyze the hydrologic characteristics of the site. The regulation at 40 CFR 231.5 stipulates that EPA Region X should prepare a finding on the Proposed Determination within fifteen days of the close of the public comment period (by June 28, 1991). In order to provide sufficient time to fully review the substantive information contained in the administrative record, submitted during the public comment period and prepared by its consultant, EPA Region X extended that time period until August 13, 1991, as authorized by 40 CFR 231.8.

During this period of extension, EPA proposed a compromise which the permittee agreed to consider. The parties plan to meet for further discussion on the compromise during the week of August 11, 1991. Therefore, in order to allow sufficient time for both parties to explore the viability of the compromise, EPA Region X hereby further extends the decision time period until October 15, 1991.

FOR FURTHER INFORMATION CONTACT: Robert S. Burd, Director, Water Division, U.S. Environmental Protection Agency,

1200 Sixth Avenue, Seattle, Washington 98101.

Dana A. Rasmussen,

Regional Administrator.

[FR Doc. 91-19411 Filed 8-14-91; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

City of Long Beach et al.; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10220. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-200554.

Title: City of Long Beach/Baker Commodities, Inc. Terminal Agreement.

Parties: City of Long Beach (City) Baker Commodities, Inc. (Baker).

Synopsis: The Agreement, filed August 8, 1991, provides for Baker: to use and occupy certain premises located at Berths 30 and 32, Pier D in the Long Beach Harbor District; to have the right to seek non-exclusive temporary berth assignments for the use of any available berths within the Harbor District; to pay a rental fee of $5,505 per month commencing July 1, 1991; and to pay all applicable City tariff charges occurring under Tariff No. 4 in connection with its operations and use of the premises.

Dated: August 9, 1991.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 91-19395 Filed 8-14-91; 8:45 am]

BILLING CODE 6730-01-M

Companhia de Navegacao Lloyd Brasilerio, et al.; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may impact and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the Federal Register in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 212-009847-025.

Title: U.S. Atlantic Coast/Brazil Agreement.

Parties: Companhia de Navegacao Lloyd Brasileiro, Companhia de Navegacao Maritima Netumar, American Transport Lines, Inc.

Synopsis: The proposed amendment would add Companhia Maritima Nacional as a party to the Agreement. It would also add provisions to the Agreement permitting space chartering to one another and cooperation in the rationalization of sailings.

Agreement No.: 213-010955-003.

Title: Atlantic Container Line/Gulf Container, Line/Compagnie General Maritime/Hapag-Lloyd, Space Charter and Sailing Agreement.

Parties: Atlantic Container Line, Gulf Container Line (GCL), B.V., Compagnie General Maritime, Hapag-Lloyd.

Synopsis: The proposed amendment would delete Gulf Container Line and Compagnie General Maritime as parties to the Agreement. It would add a new provision to the agreement authority permitting the parties to voluntarily agree upon tariff rates, rules and conditions of service in the Agreement trade. It would also make technical changes to Membership, Voting and Duration provisions of the Agreement.

Agreement No.: 207-011341.

Title: Transroll/Sea-Land Joint Service Agreement.

Parties: Transroll Navegacao, S.A., Sea-Land Service, Inc.

Synopsis: The proposed Agreement would authorize the parties to operate a joint service in the trade between the United States and Brazil.

Dated: Aug 9, 1991.

By Order of the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 91-19396 Filed 8-14-91; 8:45 am]

BILLING CODE 6730-01-M

FEDERAL RESERVE SYSTEM

ABN AMRO Holding N.V., et al.; Notice of Applications to Engage de novo in Permissible Nonbanking Activities

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that the Board has determined to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than September 3, 1991.

A. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. ABN AMRO Holding N.V., Amsterdam, The Netherlands; STICHTING PRIORITEIT ABN AMRO HOLDING, Amsterdam, The Netherlands; Stichting Administratiekantoor ABN AMRO HOLDING, Amsterdam, The Netherlands; Algemene Bank Nederland N.V., Amsterdam, The Netherlands; and

ABN AMRO North America, Inc., Chicago, Illinois; to engage *de novo* through ABN AMRO Securities Inc. ("AASI") and Amro Securities Inc., New York, New York, in certain securities powers of Amro Securities, Inc. ("ASI"), pursuant to § 225.23(b)(1) of the Board's Regulation Y. ASI recieved approval by order of the Board of Governors, effective June 4, 1990, to engage in the following activities for which AASI has not already received approval: underwriting and dealing in, to a limited extent, municipal revenue bonds, 1-4 family mortgage-related securities, commercial paper and consumer-receivable-related securities ("bank-ineligible securities").

Board of Governors of the Federal Reserve System, August 9, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-19445 Filed 8-14-91; 8:45 am]

BILLING CODE 6210-01-F

National Banc of Commerce Company, et al.; Formations of; Acquisitions by; and Mergers of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3 of the Bank Holding Company Act (12 U.S.C. 1842) and § 225.14 of the Board's Regulation Y (12 CFR 225.14) to become a bank holding company or to acquire a bank or bank holding company. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank or to the offices of the Board of Governors. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

Unless otherwise noted, comments regarding each of these applications must be received not later than September 3, 1991.

A. Federal Reserve Bank of Richmond (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *National Banc of Commerce Company*, Charleston, West Virginia; to acquire 100 percent of the voting shares of Wood County Bancorporation, Inc., Parkersburg, West Virginia, and thereby indirectly acquire Wood County Bank, Parkersburg, West Virginia.

B. Federal Reserve Bank of Chicago (David S. Epstein, Vice President) 230 South LaSalle Street, Chicago, Illinois 60690:

1. *Oak Bancorporation*, Red Oak, Iowa; to become a bank holding company by acquiring 100 percent of the voting shares of Oakland State Bank, Oakland, Iowa.

C. Federal Reserve Bank of Kansas City (Thomas M. Hoenig, Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *First National Johnson Bancshares, Inc.*, Johnson, Nebraska; to become a bank holding company by acquiring 93 percent of the voting shares of First National Bank of Johnson, Johnson, Nebraska.

Board of Governors of the Federal Reserve System, August 9, 1991.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 91-19446 Filed 8-14-91; 8:45 am]

BILLING CODE 6210-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Agency Information Collection Under OMB Review

AGENCY: Administration for Children and Families, HHS.

ACTION: Notice.

Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), we have submitted to the Office of Management and Budget (OMB) for approval a new information collection, Evaluation of Prevention Projects Relating to Drugs and Youth Gangs.

ADDRESSES: Copies of the information collection request may be obtained from Larry Guerrero, Reports Clearance Officer, by calling (202) 245-6275.

Written comments and questions regarding the requested approval for information collection should be sent directly to: Angela Antonelli, OMB Desk Officer for ACF, OMB Reports Management Branch, New Executive Office Building, room 3002, 725 17th Street, NW., Washington, DC 20503, (202) 395-7316.

Information on Document

Title: Evaluation of Prevention Projects Relating to Drugs and Youth Gangs.

OMB No.: N/A.

Description: The Omnibus Anti-Drug Abuse Act (Pub. L. 100-690, Sec. 3501) established the Drug Abuse Education and Prevention Program Relating to Youth Gangs in 1988. The purpose of this program is to conduct community-based, comprehensive, and coordinated activities to reduce and prevent the involvement of youth in gangs that engage in illicit drug-related activities. In 1989, in response to this legislation, ACYF awarded 52 discretionary grants to implement this new program.

The Administration for Children and Families is conducting an evaluation of the prevention projects on two levels: (a) At the level of the individual grantee site in terms of process and implementation; and (b) at the participant level in terms of outcomes pertaining to youth and families. The first approach involves a process evaluation of grantee sites and the second involves an outcome evaluation. Data from the youth participant, youth non-participant, and adult questionnaires will be used to assess the effectiveness of the projects in preventing the participation of youth in gangs, especially those that are involved with drugs.

Annual Number of Respondents: 2,220.

Annual Frequency: 1.

Average Burden Hours Per Response: 0.75.

Total Burden Hours: 1,650.

Dated: August 8, 1991.

Donna N. Givens,

Deputy Assistant Secretary for Children and Families.

[FR Doc. 91-19474 Filed 8-14-91; 8:45 am]

BILLING CODE 4130-01-M

Agency for Health Care Policy and Research

Meeting of the National Advisory Council for Health Care Policy, Research, and Evaluation

AGENCY: Agency for Health Care Policy and Research, PHS, HHS.

ACTION: Notice of public meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the National Advisory Council for Health Care Policy, Research, and Evaluation.

DATES: The meeting will be open to the public on Monday, September 16, from 10 a.m. to 3:30 p.m., and on Tuesday, September 17, from 8 a.m. to 11:30 a.m.

In accordance with the provisions set forth in section 552b(c)(6), title 5, U.S. Code, and section 10(d) of the Federal Advisory Committee Act, a meeting closed to the public will be held on September 17, 1991, from 12:30 p.m. to 5 p.m. to review, discuss, and evaluate grant applications. The discussion and review of grant applications could reveal confidential personal information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

ADDRESSES: The meeting will be at the Marriott Crystal City Hotel, 1999 Jefferson Davis Highway, Arlington, Virginia 22202.

FOR FURTHER INFORMATION CONTACT: Judith D. Moore, Executive Secretary of the Advisory Council at the Agency for Health Care Policy and Research, 5600 Fishers Lane, room 18A-30, Rockville, Maryland 20857, (301) 443-9942.

SUPPLEMENTARY INFORMATION:

I. Purpose

Section 921 of the Public Health Service Act (42 U.S.C. 299c) establishes the National Advisory Council for Health Care Policy, Research, and Evaluation. The Council provides advice to the Secretary and the Administrator, Agency for Health Care Policy and Research (AHCPR), on matters related to the actions of AHCPR to enhance the quality, appropriateness, and effectiveness of health care services and access to such services through scientific research and the promotion of improvements in clinical practice and the organization, financing, and delivery of health care services.

The Council is composed of public members appointed by the Secretary. These members are:

Linda H. Aiken, Ph.D.; Mr. Edward C. Bessey; Joseph F. Boyle, M.D.; Linda Burnes-Bolton, Dr. P.H.; Joseph T. Curti, M.D.; Gary L. Filerman, Ph.D.; Juanita W. Fleming, Ph.D.; David Hayes-Bautista, Ph.D.; William S. Kiser, M.D.; Kermit B. Knudsen, M.D.; Norma M. Lang, Ph.D.; Barbara J. McNeil, M.D.; Mr. Walter J. McNerney; Lawrence H. Meskin, D.D.S., Ph.D.; Theodore J. Phillips, M.D.; Barbara Starfield, M.D.; and Donald E. Wilson, M.D.

There also are Federal ex officio Members. These members are:

Administrator, Alcohol, Drug Abuse and Mental Health Administration; Director, National Institutes of Health; Director, Centers for Disease Control; Administrator, Health Care Financing Administration; Commissioner, Food and Drug Administration; Assistant Secretary of Defense (Health Affairs); and Chief Medical Director, Department of Veterans Affairs.

II. Agenda

On Monday, September 16, 1991, the open portion of the meeting will begin at 9 a.m. with the call to order and introduction of new Council members. The Administrator and other staff will report on AHCPR activities, including a presentation on the Department of Health and Human Services' AIDS activities. In the afternoon the AHCPR Administrator will present an overview on AHCPR's priorities and planning process. The Council will divide into its two subcouncils to begin an extensive discussion of AHCPR priorities. The Council will recess at 3:30 p.m.

On Tuesday, September 17, 1991, the Council will resume at 8 a.m. with further discussion of AHCPR priorities and future Council deliberations. Dr. William Roper, Director, Centers for Disease Control, will discuss activities of his agency. The open meeting will adjourn at 11:30 a.m. The Council will begin the closed portion of the meeting to review grant applications from 12:30 p.m. to 5 p.m. The meeting will then adjourn at 5 p.m.

Agenda items are subject to change as priorities dictate.

Dated: August 8, 1991.

J. Jarrett Clinton,
Administrator.

[FR Doc. 91-19380 Filed 8-14-91; 8:45 am]

BILLING CODE 4160-90-M

Food and Drug Administration

[Docket No. 91M-0258]

Quest Technologies Corp.; Premarket Approval of the Access Mobility System

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Quest Technologies Corp., Sunnyvale, CA, for premarket approval under the Medical Device Amendments of 1976 of the ACCESS Mobility System intended for use as a powered wheelchair with a stair climbing capability that is designed for use by temporarily or permanently mobility impaired individuals. After reviewing the recommendation of the Orthopedic and Rehabilitation Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant, by letter of June 27, 1991, of the approval of the application.

DATES: Petitions for administrative review by September 16, 1991.

ADDRESSES: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Nirmal K. Mishra, Center for Devices and Radiological Health (HFZ-410), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301-427-1036.

SUPPLEMENTARY INFORMATION: On July 3, 1990, CDRH received from Quest Technologies Corp., Sunnyvale, CA 94086-9716, an application for premarket approval of the ACCESS Mobility System. The device is indicated for use as a powered wheelchair with a stair climbing capability that is designed for use by temporarily or permanently mobility impaired individuals.

On November 30, 1990, the Orthopedic and Rehabilitation Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On June 27, 1991, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Dockets Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact Nirmal K. Mishra (HFZ-410), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under part 12 (21 CFR part 12) of FDA's administrative

practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before September 16, 1991, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug and Cosmetic Act (secs. 515(d), 520(h) (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: August 2, 1991.

Elizabeth D. Jacobson,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 91–19443 Filed 8–14–91; 8:45 am]

BILLING CODE 4160-01-M

Health Resources and Services Administration

Statement of Organizations, Functions and Delegations of Authority

Part H, chapter HB (Health Resources and Services Administration) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (47 FR 38409–24, August 31, 1982, as amended most recently at 56 FR 5696–67, February 12, 1991), is amended to reflect the redescription of the Division of Associated, Dental, and Public Health Professions (formerly Division of Associated and Dental Health Professions), Bureau of Health Professions.

Under Section HB-10, Organization and Functions, amend the following:

(1) Delete the Division of Associated and Dental Health Professions (HBP2) in its entirety.

(2) Add the following statement in its place:

Division of Associated, Dental, and Public Health Professions (BHP2). The Division of Associated, Dental, and Public Health Professions serves as the principal Federal focus for the development and improvement of basic professional education and continuing professional development of dentistry; public health, including preventive medicine and school health educators; environmental health, including undergraduate preparation for entry level positions; health administration, including hospitals, nursing homes/long-term care, ambulatory primary care settings, such as health maintenance organizations, community/migrant health centers, and community based organizations; the associated health professions, including veterinary medicine, optometry, and pharmacy; allied health professions, including physical therapy, occupational therapy, medical technology, dental hygiene, respiratory therapy, radiography, radiation therapy, emergency medical technicians, and a long list of similar professionals, chiropractic health care; social workers, especially in medical settings; clinical psychology; mental health workers; and other new and developing health disciplines. Specifically, the Division: (1) Provides professional direction and leadership for planning, evaluating and supporting the development and utilization of the health professionals in these fields; (2) provides leadership in maintaining contact with the employers of health professionals in these fields to monitor educational relevance to current and future needs in the work place; (3) develops contractual and staff studies concerning the future education needs of the health professions in these fields and supports the development of specialized curricula to encourage progress in basic and continuing professional development; (4) provides leadership to the grant programs administered by the Division to meet the legislated intent of the authorizations; (5) provides professional technical assistance to educational institutions and other potential applicants concerning the grant programs managed by the Division; (6) monitors awarded grants and provides professional technical assistance to assist grantees in the accomplishment of their project objectives within the context of national strategies for the health professionals in these fields; (7) monitors and assists in the credentialing process for the health professionals in these fields, including accreditation, certification by professional organizations, and licensure; (8) maintains liaison with professional associations concerned with the quality of education for the health professionals in these areas; (9) coordinates activities with other Bureau, Agency, Department, and Federal educational activities for the health professionals in these fields to encourage cooperation and accomplish national health objectives; and (10) monitors data collection activities in the Bureau and professional associations to assure timely and accurate information is available concerning the supply and quality of education of the health professionals in these areas and information is available concerning the grant programs and training activities of the Division.

These organizational and functional changes are effective upon date of signature.

Dated: August 8, 1991.

R.G. Harmon,

Administrator, HRSA.

[FR Doc. 91–19379 Filed 8–14–91; 8:45 am]

BILLING CODE 4160-15-M

DEPARTMENT OF THE INTERIOR

Performance Review Board Appointments

AGENCY: Department of the Interior.

ACTION: Notice of appointment of additional members of Performance Review Boards.

SUMMARY: This notice provides the names of additional individuals who have been appointed to serve as members of the two of the Department of the Interior's Performance Review Boards. The publication of these appointments is required by section 405(a) of the Civil Service Reform Act of 1978 (Pub. L. 95–454, 5 U.S.C. 4314(c)(4).

DATES: These appointments are effective August 15, 1991.

FOR FURTHER INFORMATION CONTACT: Morris A. Simms, Director of Personnel, Office of the Secretary, Department of the Interior, 1849 C Street NW., Washington, DC 20240, Telephone Number: 208–6761.

Department of the Interior Additional Names for SES Performance Review Boards (PRB)—FY 1991

Office of the Secretary and Assistant Secretary—Policy, Management and Budget

Mary Ann Lawler (CA), Chairperson
Daniel Shillito (NC)
Jeffrey Arnold (NC)
Jonathan Deason (CA)
Gabe Paone (CA)
Carmen Maymi (CA)
Hazel Elbert (CA)
Marvin Pierce (CA)
Patricia Hastings (CA)
Joyce Fleischman (CA)*

Departmental Performance Review Board

John Schrote (NC), Chairperson
Selma Sierra (NC)
Morris A. Simms (CA)
Doyle G. Frederick (CA)
Jean Baines (CA)
Herbert Cables (CA)
Ruth VanCleve (CA)
J. Austin Burke (CA)
Denise Meridith (CA)
Thomas Sheehan (CA)*

*Newly appointed.

Dated: August 9, 1991.

Approved for the Executive Resources Board.

John Schrote,

Assistant Secretary—Policy, Management and Budget.

[FR Doc. 91-19465 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-10-M

Bureau of Indian Affairs

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

October 23, 1991.

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau's clearance officer, at the phone number listed below. Comments and suggestions on the proposal should be made directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1076–______), Washington, DC 20503, telephone (202) 395-7340.

Title: Bureau of Indian Affairs' Early Childhood Development Program Application, 25 CFR part 35.

OMB approval number: 1076–______.

Abstract: "Aid for education" "American Indian education"—The Bureau of Indian Affairs is publishing a proposed rule which establishes minimum program standards for the operation of Early Childhood Development Programs and specifies the application and approval process for applicants of such programs. This proposed rule applies to tribes, tribal organizations, ad consortia of tribes and tribal organizations who have combined memberships of 500 members or more to fund early childhood development programs.

Freqency: Annual.

Description of respondents: Tribes, tribal organizations, and consortia of tribes and tribal organizations who have combined membership of 500 members or more.

Estimated completion time: 3 hours.

Annual responses: 700.

Annual burden hours: 2,100.

Bureau clearance officer: Gail Sheridan 202-208-2685.

William Mehojah,

Chief, Branch of Elementary and Secondary Education.

[FR Doc. 91-19277 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-02-M

Bureau of Land Management

[AK-967-4230-15; AA-6978-A]

Alaska Native Claims Selection

In accordance with Departmental regulation 43 CFR 2650.7(d), notice is hereby given that a decision to issue conveyance under the provisions of section 14(b) of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. 1601, 1613(b), will be issued to Kootznoowoo, Incorporated for approximately 1,930 acres. The lands involved are in the vicinity of Angoon, Alaska.

T. 77 S., Rs. 87 and 88 E., Copper River Meridian, Alaska

A notice of the decision will be published once a week, for four (4) consecutive weeks, in the JUNEAU EMPIRE. Copies of the decision may be obtained by contacting the Alaska State Office of the Bureau of Land Management, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513-7599 ((907) 271-5960).

Any party claiming a property interest which is adversely affected by the decision, an agency of the Federal government or regional corporation, shall have until September 16, 1991 to file an appeal. However, parties receiving service by certified mail shall have 30 days from the date of receipt to file an appeal. Appeals must be filed in the Bureau of Land Management at the address identified above, where the requirements for filing an appeal may be obtained. Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights.

Patricia A. Baker,

Acting Chief, Branch of KCS Adjudication.

[FR Doc. 91-19500 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-JA-M

Cedar City District Grazing Advisory Board Meeting

[UT-040-01-4320-12]

Notice is hereby given in accordance with Public Law 992-463 that a meeting and field tour of the Cedar City District Grazing Advisory Board will be held on September 19, 1991. The meeting will begin at 9 a.m. at the Dixie Resource Area Office, 225 N. Bluff, St. George, UT. Agenda items will include RMP updates, pending legislation, resource boundary changes, predator control and range project maintenance. Those planning to attend the field trip should provide their own lunch and transportation.

Grazing Advisory Board meetings are open to the public. Interested persons may make oral or file written statements for the Board's consideration. Anyone wishing to make a statement must notify the District Manager, Bureau of Land Management, 176 East D.L. Sargent Drive, Cedar City, Utah 84720, phone (801) 586-2401, by Friday, September 13, 1991. Time limits may be established by the District Manager.

Dated: August 7, 1991.

Gordon R. Staker,

District Manager.

[FR Doc. 91-19450 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-DQ-M

[WY-920-41-5700; WYW83318]

Proposed Reinstatement of Terminated Oil and Gas Lease

August 7, 1991.

Pursuant to the provisions of Public Law 97-451, 96 Stat. 2462-2466, and 43 CFR 3108.2-3(a) and (b)(1), a petition for reinstatement of oil and gas lease WYW83318 for lands in Lincoln County, Wyoming, was timely filed and was accompanied by all the required rentals accruing from the date of termination.

The lessee has agreed to the amended lease terms for rentals and royalties at

rates of $5.00 per acre, or fraction thereof, per year and 16-⅔ percent, respectively.

The lessee has paid the required $500 administrative fee and $125 to reimburse the Department for the cost of this Federal Register notice. The lessee has met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the Bureau of Land Management is proposing to reinstate lease WYW03318 effective April 1, 1991, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Beverly J. Poteet,

Supervisory Land Law Examiner.

[FR Doc. 91-19462 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-22-M

[CA-050-09-4333-04; CA 26636]

Realty Action; Noncompetitive Sale of Public Lands in Trinity County; CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: The following public land has been found suitable for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713), at no less than estimated fair market value (formerly segregated for exchange by Federal Register document in Vol. 56, No. 17, dated 1-25-91). The land will not be offered for sale until at least 60 days after the date of this notice.

Mount Diablo Meridian

T. 33 N., R. 9 W.

Section 5: Lot 54 (portion of)

Containing 0.45 acre, more or less.

The land described is hereby segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action or 270 days from the date of publication of this notice, whichever occurs first.

This land is being offered by direct sale to George E. and Jane M. Belden. It has been determined that the subject parcel contains no known mineral values; therefore, mineral interests may be conveyed simultaneously. Purchaser has made application for conveyance of those mineral interests.

DATES: On or before September 30, 1991, interested parties may submit comments to the Area Manager, Redding Resource Area, 355 Hemsted Drive, Redding, California 96002. In the absence of timely objections, this proposal shall become the final determination of the Department of the Interior.

ADDRESSES: Detailed information concerning this action is available for review at the office listed above.

FOR FURTHER INFORMATION CONTACT: Patricia Cook, Realty Specialist, Redding Resource Area, at the above address.

SUPPLEMENTARY INFORMATION: The patent, when issued, will contain a reservation to the Untied States for ditches and canals.

Mark T. Morse,

Area Manager.

[FR Doc. 91-19461 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-40-M

[CA-060-01-4212-13; CA-28048]

Realty Action; Exchange of Public and Private Lands, Riverside County, CA

AGENCY: Bureau of Land Management, Interior.

ACTION: Amendment to notice of realty action, CA-28048.

SUMMARY: This notice amends the legal description of the selected public lands and the offered private lands in the notice of Realty Action published in the Federal Register on Friday, May 17, 1991, in Vol. 56, No. 96, pages 22884, 22885, and 22886.

The land description is amended to include:

Selected Public Lands

T. 3 S., R. 5 E.,

Sec. 34: Lot 32.

Riverside County, California.

Containing 5 Acres, more or less.

Offered Private Lands

San Bernardino Meridian, California

T. 8 S., R. 6 E.,

Sec. 17: S½NW¼.

Riverside County, California.

Containing 80 acres, more or less.

FOR FURTHER INFORMATION CONTACT: Peter Kempenich, BLM Palm Springs-South Coast Resource Area, 400 S. Farrell Dr., suite B-205, Palm Springs, California A 92262, (619) 323-4421.

Dated: August 6, 1991.

James L. Williams,

Acting District Manager.

[FR Doc. 91-19452 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-40-M

[CA-010-4212-13; CACA 28551]

Realty Action: Exchange of Public Land, El Dorado County, CA

AGENCY: Bureau of Land Management, Interior.

SUMMARY: The following described public land (surface and mineral estate) is being considered for exchange pursuant to section 206 of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1713):

Selected Public Land

Mount Diablo Meridian, California

T. 9N., R.11E.,

Sec. 6: portion of the S½ of lot 26.

Comprising 4.3 acres, more or less.

SUPPLEMENTARY INFORMATION: The purpose of the exchange is to resolve an encroachment problem; a survey revealed that a portion of the adjacent landowner's home (Sherman Shroeder) was inadvertently built on the above described public land. The subject land would be exchanged to the Nature Conservancy (TNC) who, in turn, would sell the property to Mr. and Mrs. Sherman Shroeder at the appraised fair market value. In exchange for the above public land TNC would offer to the United States important wetlands and waterfowl habitat located in the Central Valley of California. The proposed exchange is considered to be in the public interest. The action is consistent with the North American Waterfowl Management Plan and with the Central Valley Habitat Venture. The proposal is also in conformance with the Bureau's land use plans.

The tract would be transferred subject to a reservation to the United States for a right-of-way for ditches and canals constructed under the authority of the Act of August 30, 1890 (43 U.S.C. 945). All necessary clearances including clearances of archeology, rare plants and animals would be completed prior to any conveyance of title by the U.S.

The selected public land described above is hereby segregated from settlement, location and entry under the public land laws and mining laws for a period of two years from the date of publication of this notice in the Federal Register.

ADDRESSES: For a period of 45 years from publication of this notice in the Federal Register, interested parties may submit comments concerning the Federal land to the District Manager, c/o Folsom Area Manager, Folsom Resource Area, 63 Natoma Street, Folsom, California 95630.

FOR ADDITIONAL INFORMATION: Contact Mike Kelley at (916) 985-4474 or at the address above.

D. K. Swickard,

Area Manager.

[FR Doc. 91-19454 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-40-M

[ID-040-4212-14-242A]

Realty Action, I-27114 and I-27115 Noncompetitive Sale of Public Lands in Custer Co., Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action, I-27114 and I-27115 Noncompetitive Sale of Public Lands in Custer County, Idaho.

DATE AND ADDRESS: The sale offering will be held on October 16, 1991, at 10 a.m. at the Salmon District Office, Highway 93 South, Box 430, Salmon, Idaho 83467.

SUMMARY: Based on public supported land use plans the following described land has been examined and identified as suitable for disposal by public sale under section 203 of the Federal Land Policy and Management Act (FLPMA) of 1976 (90 Stat. 2750, 43 U.S.C. 1713), at no less than the appraised fair market value.

The below described lands are hereby segregated from appropriation under the public land laws, including the mining laws, as provided by 43 CFR 2711.1-2(d).

Parcel	Legal description	Acres	Sale type
I-27114	R.14N., R.18E., B.M. Section 2: Lot 5.	3.36	Direct.
I-27115	R.14N., R.19E., B.M. Section 7: Lot 8.	.67	Direct.

When patented the lands will be subject to the following reservations:

1. Ditches and Canals (43 U.S.C. 945).
2. Geothermal resources.
3. All valid and existing rights and reservations of record, including:

a. I-27114 only: Rights-of-way I-20147, I-011662.

b. I-27115 only: Rights-of-way I-16458, I-20734, those rights exercised by Custer County for an existing public road under Revised Statute 2477.

Sale Procedures

These Parcels will be offered by Direct Sale to Larry Sidlo (I-27114), and Denis Piotrowski (I-27115) at the appraised fair market value. These lands have been improved and used by these parties and they are the owners of the adjoining private lands. Disposal by direct sale will legalize their use and protect their investments. The designated bidders will be notified of the final appraised fair market value prior to the date of sale. No other bids or bidders will be considered.

The designated bidders will be required to submit payment of at least thirty (30) percent of the appraised fair market value by cash, certified or cashier's check, bank draft or money order at the above address on October 16, 1991. The balance will be due within 180 days, payable in the same form, and at the same location. Failure to submit the remainder of the payment within 180 days will result in cancellation of the sale offering and forfeiture of the deposit. A bid will also constitute an application for conveyance of the mineral interests of no known value. A $50.00 non-returnable filing fee for processing the mineral conveyance must accompany each bid.

SUPPLEMENTARY INFORMATION: Detailed information concerning these parcels, terms and conditions of the sale, and bidding instructions may be obtained by contacting Robert Hium at (208) 756-5400. For a period of 45 days from the date of this notice, interested parties may submit comments regarding the sale to the Salmon District Manager at the above address. Objections will be reviewed by the State Director who may sustain, vacate or modify this realty action. In the absence of any objections, this realty action will become the final determination of the Department of the Interior.

Dated: August 5, 1991.

Jerry A. Wilfong,

Acting District Manager.

[FR Doc. 91-19453 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-GG-M

Fish and Wildlife Service

Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

PRT 760488.

Applicant: National Zoo, Washington, DC.

The applicant requests a permit to import three male and three female black lion tamarins (*Leontopithecus chrysopygus*) from Brazil for a captive breeding program and zoological display. All animals were bred in captivity.

PRT 759981.

Applicant: The Peregrine Fund, Inc., Boise, ID.

The applicant requests a permit to export one male and one female captive-hatched Mauritius kestrels (*Falco punctatus*) to Jersey Wildlife Preservation Trust, Jersey, Channel Islands, for captive propagation for future reintroduction of the species on the Island of Mauritius.

PRT 759979.

Applicant: The Peregrine Fund, Inc., Boise, ID.

The applicant requests a permit to export three male and three female captive-hatched Mauritius kestrels (*Falco punctatus*) to National Centre for Birds of Prey, Newent, Gloucester, England, for captive propagation for future reintroduction of the species on the Island of Mauritius.

PRT 761010.

Applicant: Michael John Schmidt, Portland, OR.

The applicant requests a permit to import 1000 10ml blood samples taken from wild Asian elephants (*Elephus maximus*) held at Tiger Tops Jungle Lodge, Katmandu, Nepal, for scientific research.

PRT 760745.

Applicant: Los Angeles, Zoo, Los Angeles, CA.

The applicant requests a permit to export one male and one female captive-bred white-cheeked gibbon (*Hylobates concolor gabriellae*) to the Mulhouse Zoo, Mulhouse, France, for breeding purposes.

PRT 747191.

Applicant: Quad Consultants, Bakersfield, CA.

The applicant requests amendment and renewal of a permit to live-trap and release Tipton kangaroo rats (*Dipodomys nitratoides nitratoides*) and giant kangaroo rats (*Dipodomys ingens*) on Lawton Powers, Inc. Property, South Asphalto gas and oil pads in the NE¼ of the NW¼ of section 36, T30S, R22E, Mount Diablo Base and Meridian, Metson Oil Field in section 24, T11N, R23W, San Bernardino Base and Meridian, and Kern County Water Agency emergency water wells, in San Joaquin Valley, California, for biological survey purposes.

PRT 758163.

Applicant: Regional Environmental Consultants, San Diego, CA.

The applicant requests a permit to live-capture and release Stephen's kangaroo rats (*Dipodomys stephensi*) in Riverside County, California, to determine the presence or absence of the species in the study area.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203 and

must be received by the Director within 30 days of the date of this publication. Documents and other information submitted with these applications are available for review by any party who submits a written request for a copy of such documents to, or by appointment during normal business hours (7:45–4:15) in, the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203. Phone: (703/358–2104); Fax: (703/358–2281).

Dated: August 9, 1991.

Maggie Tieger,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 91–19387 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–55–M

Receipt of Application for Permit

The public is invited to comment on the following application for a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing marine mammals and endangered species (50 CFR parts 17 and 18).

File no. PRT–758641.

Applicant Name: Caribbean Aquatic Animal Health Project, Department of Marine Sciences, University of Puerto Rico, RUM, POB 908 Lajas, Puerto Rico 00667–0908.

Type of Permit: Scientific Research, Enhancement of Survival or Recovery.

Name of Animals: West Indian Manatee (*Trichechus manatus*) and sea turtles in the families Cheloniidae and Dermochelidae.

Summary of Activity to be Authorized: The applicant proposes to take dead (or their parts), live stranded, sick or injured manatees and sea turtles for the purposes of salvage, rescue and rehabilitation. Activities include (a) collection and transportation of dead specimens; (b) performing necropsies and retaining osteological remains as part of a permanent collection; (c) collection of biological measurements and samples; (d) rescue and transport of stranded, sick or injured animals to the University of Puerto Rico Isla Magueyes Marine Laboratory or other facilities for treatment and rehabilitation; (e) mark manatees by freeze band on shoulder or middorsal back and tag sea turtles with plastic or metal flipper tags; and (f) release back into the wild rehabilitated animals or transfer nonreleasable ones to acceptable facilities for permanent captivity or further rehabilitation.

Source of Marine Mammals for Research: U.S. Territorial waters in the Caribbean to include the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

Period of Activity: At least through 1996.

Concurrent with the publication of this notice, the Office of Management Authority is forwarding copies of the application to the Marine Mammal Commission and the Committee of Scientific Advisors for their review.

Written data or comments and/or requests for a public hearing on this application should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication. Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

Documents and other information submitted with this application are available for review by any party who submits a written request for a copy of such documents to, or by appointment during normal business hours (7:45–4:15) in, the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203. Phone: (703/358–2104); FAX: (703/358–2281).

Dated: August 9, 1991.

Maggie Tieger,

Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 91–19388 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–55–M

Minerals Management Service

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget (OMB) for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collections of information and related forms may be obtained by contacting the Bureau's Clearance Officer at the telephone number listed below. Comments and suggestions on the proposal should be made directly to the Bureau Clearance Officer and to the Office of Management and Budget; Paperwork Reduction Project (1010–0041); Washington, DC 20503, telephone (202) 395–7340, with copies to John V. Mirabella; Acting Chief, Engineering and Standards Branch; Engineering and Technology Division; Mail Stop 4700; Minerals Management Service; 381 Elden Street; Herndon, Virginia 22070–4817.

Title: 30 CFR part 250, subpart K, Production Rates.

OMB Approval Number: 1010–0041.

Abstract: The information submitted by respondents is used by MMS in its efforts to conserve natural resources, prevent waste, and protect correlative rights including the Government's royalty interest.

Bureau Form Number: None.

Frequency: Varies.

Description of respondents: Federal Outer Continental Shelf oil and gas lessees.

Estimated Completion Time: 1.8 hours (rounded).

Annual Responses: 1,495.

Recordkeeping Hours: 300.

Annual Burden Hours: 3,040.

Bureau Clearance Officer: Dorothy Christopher, (703) 787–1239.

Dated: June 21, 1991.

Thomas Gernhofer,

Associate Director for Offshore Minerals Management.

[FR Doc. 91–19455 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–MR–M

National Park Service

National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before August 3, 1991. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by August 30, 1991.

Carol D. Shull,

Chief of Registration, National Register.

Arkansas

White County

Abington, William Thomas, House (White County MPS), Center St. SW of jct. with AR 367, Beebe, 91001250

Ackins House (White County MPS), Jct. of AR 31 and AR 305, Floyd vicinity, 91001322

American Legion Hall (White County MPS), Jct. of Race and Spruce Sts., Searcy, 91001186

Andrews, Col. Ralph, House (White County MPS), 517 W. Center St., Beebe, 91001253

Arnold Farmstead (White County MPS), Off Maple St. S of Deener Cr., Searcy, 91001187
Baldock House (White County MPS), Jct. of S. Elm St. and W. Woodruff Ave., Searcy, 91001239
Bank of Searcy (White County MPS), 301 N. Spruce St., Searcy, 91001228
Beebe Jail (White County MPS), E of jct. of N. Main and Illinois Sts., 5Beebe, 91001251
Beebe Theater (White County MPS), Center St., Beebe, 91001265
Bell House (White County MPS), 302 W. Woodruff Ave., Searcy, 91001201
Berry House (White County MPS), 208 Hickory, Beebe, 91001262
Big Four School (White County MPS), Co. Rd. 383 S of jct. with AR 258, Providence vicinity, 91001192
Bloom House (White County MPS), Jct. of N. Maple and Academy Sts., Searcy, 91001176
Blunt House Livestock Barn (White County MPS), Co. Rd. 357 E of jct. with AR 157, Midway vicinity, 91001363
Boggs, James William, House (White County MPS), Austin St. between South and Torrence Sts., Pangburn, 91001298
Bone, Luke, Grocery—Boarding House (White County MPS), Jct. of Main and Market Sts., Bald Knob, 91001275
Booth, Green, House (White County MPS), Jct. of S. Pecan St. and W. Center Ave., Searcy, 91001202
Booth—Weir House (White County MPS), W. First St., McRae, 91001345
Brooks House (White County MPS), 704 E. Market St., Searcy, 91001217
Brown House (White County MPS), Elm St., Bald Knob, 91001268
Brown, Joe, House and Farmstead (White County MPS), Co. Rd. 529 NW of Little Red, Little Red vicinity, 91001338
Burnett House (White County MPS), Co. Rd. 766 NW of Searcy, Searcy vicinity, 91001337
Caldwell House (White County MPS), Jct. of E. 2nd and Smith Sts., McRae, 91001347
Campbell—Chrisp House (White County MPS), 102 Elm St., Bald Knob, 91001280
Cary House (White County MPS), Jct. of Searcy and Short Sts., Pangburn, 91001293
Chandler House (White County MPS), Jct. of Co. Rds. 327 and 379, Stevens Creek vicinity, 91001310
Childers Farmstead (White County MPS), E of AR 367 s of McRae, McRae vicinity, 91001349
Churchill—Hilger House (White County MPS), Jct. of Main and Searcy Sts., Pangburn, 91001301
Cobb, Pattie, Hall (White County MPS), 900 E. Center, Harding University, Searcy, 91001209
Cooley, Sam, Barn (White County MPS), Co. Rd. 96 SE of Bald Knob, Bald Knob vicinity, 91001282
Coward House (White County MPS), 1105 N. Maple St., Searcy, 91001229
Cremane House (White County MPS), Co. Rd. 95 W of Bradford Lake, Bradford, 91001320
Critz, Col. John, Farm, Springhouse (White County MPS), Co. Rd. 818 W of jct. with Co. Rd. 41, Center Hill vicinity, 91001333
Cross House (White County MPS), 410 S. Main St., Beebe, 91001259
Cumberland Presbyterian Church (White County MPS), Jct. of Race and Spring Sts., Searcy, 91001225
Cypert, Jesse N., Law Office (White County MPS), 104 E. Race St., Searcy, 91001179
Doniphan Lumber Mill Historic District (White County MPS), Around Doniphan Lake off AR 367, Doniphan, 91001196
Doss House (White County MPS), 408 N. Main St., at Louisiana St., Beebe, 91001264
Doyle, David, House No. 2 (White County MPS), Jct. of Co. Rd. 953 and AR 5, El Paso, 91001302
Edie, James W., House (White County MPS), Jct. of Jackson and Washington Sts., Judsonia, 91001189
El Paso Bank (White County MPS), Co. Rd. 3 E of jct. with AR 5, El Paso, 91001303
Elm Street House (White County MPS), Elm St., Bald Knob, 91001269
Emmer, Joe, House (White County MPS), Co. Rd. 47, Holly Springs vicinity, 91001327
First Christian Church (White County MPS), Jct. of N. Main and E. Market Sts., Searcy, 91001198
First United Methodist Church (White County MPS), Jct. of Main and Market Sts., Searcy, 91001206
Floyd Cotton Gin (White County MPS), Jct. of AR 31 and AR 305, Floyd vicinity, 91001324
Fox Motel House (White County MPS), AR 367, Bald Knob, 91001267
Freeman, Wood, House No. 2 (White County MPS), 703 W. Race St., Searcy, 91001181
Freeman, Wood, House No. 1 (White County MPS), 702 Arch St., Searcy, 91001185
Frizell, Dr., House (White County MPS), Jct. of US 67 and Elm St., Bradford, 91001318
Garrard, Lizzie, House (White County MPS), N. Cypress St., Beebe, 91001263
Gooden, Milt, House (White County MPS), Co. Rd. 83 SE of Bald Knob, Bald Knob vicinity, 91001281
Gordon, Leonard, Homestead, Hexagonal Grain Crib (White County MPS), Co. Rd. 69, Twentythree vicinity, 91001311
Gravel Hill Baptist Church (White County MPS), Gravel Hill Road, Gravel Hill, 91001323
Gray House (White County MPS), Jct of Co. Rds. 758 and 46, Crosby vicinity, 91001334
Gray, Louis, Homestead, Barn (White County MPS), AR 157 E of Plainview, Plainview vicinity, 91001194
Gray, Rufus, House (White County MPS), Jct. of Austin and South Sts., Pangburn, 91001294
Gray—Kincaid House (White County MPS), Jct. of Co. Rds. 46 and 759, Crosby vicinity, 91001335
Griffithville School (White County MPS), AR 11 W of jct. with AR 385, Griffithville, 91001357
Hale, Thomas Jefferson, General Merchandise Store (White County MPS), Jct of Co. Rds. 62 and 433, Vinity Corner, 91001358
Hall, Fred, House (White County MPS), Jct. of 2nd and W. Searcy Sts., Kensett, 91001222
Hammond, Mary Alice, House (White County MPS), Co. Rd. 839 W of jct. with AR 367, Searcy, 91001204
Harper, Roy, House (White County MPS), Co. Rd. 16 E of jct. with AR 5, Romance vicinity, 91001304
Hartsell, Morris, Farmstead (White County MPS), AR 157, Steprock vicinity, 91001340
Hassell House (White County MPS), Jct. of S. Elm St. and W. Woodruff Ave., Searcy, 91001205
Hays, Brady, Homestead (White County MPS), US 167 S of Denmark, Denmark vicinity, 91001312
Herring Building (White County MPS), Jct. of E. First and Smith Sts., McRae, 91001348
Hickmon, Marshall, Homestead (White County MPS), AR 87, Bradford, 91001317
Hickmon, U. L., Hardware Store (White County MPS), Jct. of Main and Second Sts., Bradford, 91001316
Hicks, Ida, House (White County MPS), 410 W. Arch St., Searcy, 91001180
Hilger, Louis N., Homestead, Livestock Barn (White County MPS), Co. Rd. 374 W of jct. with AR 157, Providence vicinity, 91001191
Hill Farm (White County MPS), N of US 67 SW of Beebe, Beebe vicinity, 91001258
Hoag House (White County MPS), Jct. of AR 157 and AR 367, Judsonia vicinity, 91001236
Holly Grove School (White County MPS), Co. Rd. 379 N of jct. with Co. Rd. 327, Stevens Creek vicinity, 91001309
Honey Hill Christian Union Church (White County MPS), S of AR 36 SW of Searcy, Searcy vicinity, 91001352
Hoofman Farmstead Barn (White County MPS), Between Plainview and the Little Red R., Searcy vicinity, 91001188
Hoofman, Arthur W., House (White County MPS), Jct. of E. Race and N. Cross Sts., Searcy, 91001184
Hoofman, Tobe, Farmstead (White County MPS), AR 371 N of jct. with AR 157, Providence vicinity, 91001238
Hopewell District No. 45 School (White County MPS), AR 258 W of Lake Bald Knob, Hopewell vicinity, 91001283
Hunt House (White County MPS), 707 W. Center St., Searcy, 91001207
Hunt, Thomas, House (White County MPS), AR 157 N of Plainview, Plainview vicinity, 91001193
Hutchinson, L. D., House (White County MPS), AR 31 N of jct. with AR 305, Floyd vicinity, 91001325
James, Dr., House (White County MPS), Jct. of W. Center and S. Gum Sts., Searcy, 91001241
Jameson—Richards Cafe (White County MPS), AR 367 E of jct. with Vine St., Bald Knob, 91001266
Jameson—Richards Gas Station (White County MPS), jct. of AR 367 and Vine St., Bald Knob, 91001279
Joiner House (White County MPS), 708 Market St., Searcy, 91001214
Jones, Mark P., House (White County MPS), Jct. of Center and Fir Sts., Searcy, 91001197
Judsonia Community Building Historic District (White County MPS), jct. of Judson Ave. and 6th St., Judsonia, 91001234
Judsonia High School Gymnasium (White County MPS), Roadman Ave., Judsonia, 91001232
Kelly, C.D., House (White County MPS), Jct. of Main and Adams Sts., Judsonia, 91001190
Kimbrough, S. A., House (White County MPS), 302 E. Illinois St., Beebe, 91001252

Klotz, Henry W., Sr., Service Station (White County MPS), W. First St., Russell, 91001273
Klotz, Henry, Sr., House (White County MPS), First St., Russell, 91001285
Larned, Capt., House (White County MPS), AR 157 N of US 64, Judsonia vicinity, 91001235
Lattimer House (White County MPS), Jct. of Oak and Market Sts., Searcy, 91001215
Laws—Jarvis House (White County MPS), 409 N. Main St., Beebe, 91001256
Lea, Harvey, House (White County MPS), Co. Rd. 70, Russell, 91001270
Leggett House (White County MPS), AR 124 E of Little Red, Little Red, 91001339
Lemay House (White County MPS), 305 S. Cypress St., Beebe, 91001254
Letona Hotel (White County MPS), Off AR 310, Letona, 91001329
Lightle House (White County MPS), Co. Rd. 76, Searcy vicinity, 91001224
Lightle House (White County MPS), 107 N. Elm St., Searcy, 91001244
Lightle, Ben, House (White County MPS), Jct. of N. Locust and E. Market Sts., Searcy, 91001216
Lightle, William H., House (White County MPS), 801 E. Race St., Searcy, 91001226
Little, Jim, House (White County MPS), Walmut St. E of jct. with Front St., Bradford, 91001315
Livestock and Equipment Barn, Glenn Homestead (White County MPS), AR 124 NE of Pangburn, Pangburn vicinity, 91001287
Lone Star School (White County MPS), E of Big Mingo Cr., Lone Star vicinity, 91001355
Lovell, Dr., House (White County MPS), Walnut St. E of jct. with Main St., Bradford, 91001314
Maddox, E. D., Farm Chicken House (White County MPS), Co. Rd. 36 E of jct. with AR 5, Rosebud, 91001359
Marsh, Walter, House (White County MPS), Jct. of Maple and Torrence Sts., Pangburn, 91001288
Marsh, Wesley, House (White County MPS), Jct. of AR 16 and AR 305, Letona vicinity, 91001328
Martindale Corn Crib (White County MPS), AR 310, Letona, 91001330
Mason House (White County MPS), W. Main St. W of jct. with Walnut St., Bradford, 91001319
Mayfair Hotel (White County MPS), Jct. of Spring and Center Sts., Searcy, 91001242
McAdams House (White County MPS), Jct. of Maple and South Sts., Pangburn, 91001289
McAdams, Dr., House (White County MPS), Jct. of South and Searcy Sts., Pangburn, 91001300
McDonald, Emmett, House (White County MPS), Co. Rd. 443 SE of McRae, McRae vicinity, 91001368
McRae Jail (White County MPS), E. First St., McRae, 91001344
Methodist Episcopal Church, South (White County MPS), Jct. of Main and Center Sts., Bald Knob, 91001278
Miller, Emmett, House (White County MPS), AR 371 E of Plainview, Plainview vicinity, 91001237
Mills House
(White County MPS)
200 W. Searcy St.,
Kensett, 91001220
Missouri—Pacific Depot
(White County MPS)
Jct. of Market and Ramey Sts.,
Bald Knob, 91001276
Moody House
(White County MPS)
104 Market St.,
Bald Knob, 91001277
Moore House
(White County MPS)
405 Center St.,
Searcy, 91001210
Morris Institute Dairy Barn
(White County MPS)
Co. Rd. 41 S of jct. with Co. Rd. 818,
Crosby vicinity, 91001332
National Guard Armory Building
(White County MPS)
Jct. of Race and N. Locust Sts.,
Searcy, 91001178
Neaville, J.A., House
(White County MPS)
AR 385 N of jct. with AR 11,
Griffithville, 91001356
New Mt. Pisgah School
(White County MPS)
Between Mt. Pisgah and Little Cr.,
New Mt. Pisgah vicinity, 91001331
Nimmo Clubhouse
(White County MPS)
C. Rd. 65 at Little Red R.,
Nimmo vicinity, 91001360
O'Neal, Howard, Farm
(White County MPS)
Co. Rd. 73 S of Russell,
Russell vicinity, 91001286
Pangburn, Austin, House
(White County MPS)
Jct. of Main and Austin Sts.,
Pangburn, 91001290
Paschall House
(White County MPS)
Jct. of N. Oak and E. Center Sts.,
Searcy, 91001203
Patman House
(White County MPS)
Jct. of Mountain and Jackson Sts.,
Pangburn, 91001292
Pemberton House
(White County MPS)
601 N. Cypress St.,
Beebe, 91001255
Pence—Carmichael Farm, Barn and Root Cellar
(White County MPS)
Off AR 31 E of Romance,
Romance vicinity, 91001305
Plummer House
(White County MPS)
314 Alabama St.,
Beebe, 91001247
Powell Clothing Store
(White County MPS)
230 N. Main St.,
Beebe, 91001249
Prince House
(White County MPS)
Co. Rd. 68 NW of Velvet Ridge,
Velvet Ridge vicinity, 91001307
Ransom, Edward, Farmstead, Livestock and Equipment Barn
(White County MPS)
Co. Rd. 359 W of jct. with US 167,
Midway, 91001361
Rascoe House
(White County MPS)
702 Main St.,
Searcy, 91001213
Ray, Sam, House
(White County MPS)
AR 305 NE of jct. with Co. Rd. 47,
Clay vicinity, 91001296
Rhew, J. C., Co. Packing Shed
(White County MPS)
Co. Rd. 376 NE of Providence
Providence vicinity, 91001343
Rialto Theater
(White County MPS)
Jct. of Race and Spring Sts.,
Searcy, 91001231
Robertson Drugstore
(White County MPS)
Jct. of Spring and Arch Sts.,
Searcy, 91001245
Robertson House
(White County MPS)
Jct. of 2nd and Dandridge Sts.,
Kensett, 91001221
Rock Building
(White County MPS)
Co. Rd. 370 S of jct. with AR 157,
Plainview vicinity, 91001195
Rodgers, Porter, Sr., House
(White County MPS)
Jct. of N. Oak and E. Race Sts.,
Searcy, 91001230
Rodgers, Bob, House
(White County MPS)
Jct. of Spring St. and W. Woodruff Ave.,
Searcy, 91001219
Roper House
(White County MPS)
Hill Street,
McRae, 91001346
Russell Jail
(White County MPS)
Off Elm St.,
Russell, 91001271
Scott—Davis House
(White County MPS)
Co. Rd. 15 SW of Romance,
Romance vicinity, 91001306
Searcy City Hall
(White County MPS)
Jct. of Gum and Race Sts.,
Searcy, 91001227
Searcy Post Office
(White County MPS)
Jct. of Gum and Arch Sts., SW corner,
Searcy, 91001200
Sears, Dean L. C. House
(White County MPS)
805 E. Center St.,
Searcy, 91001208
Sellers House
(White County MPS)
702 W. Center St.,
Beebe, 91001261
Shue House
(White County MPS)
108 Holly St.,
Beebe, 91001257
Shutter, John, House
(White County MPS)
Jct. of Austin and Main Sts.,
Pangburn, 91001299
Siler, Luther, Gin
(White County MPS)
AR 124 W of jct. with AR 157,
Sunnydale, 91001367

Simpson, Stanley, Farmstead Picking Sled (White County MPS)
Co. Rd. 390 W of jct. with AR 157,
Providence, 91001342
Smith House
(White County MPS)
607 W. Arch Ave.,
Searcy, 91001218
Smith, A. J., House
(White County MPS)
AR 385,
Griffithville, 91001223
Smith—Moore House
(White County MPS)
901 N. Main St.,
Beebe, 91001246
Smyrna Methodist Church
(White County MPS)
AR 36 E of Center Hill,
Center Hill vicinity, 91001336
Snipes, Dr. Emmett, House
(White County MPS)
Jct. of E. Market and N. Locust Sts.,
Searcy, 91001243
St. Richard's Catholic Church (White County MPS), Jct. of Hickory and Cleveland Sts., Bald Knob, 91001274
Staggs—Huffaker Building (White County MPS), Jct. of N. Main and W. Illinois Sts., Beebe, 91001250
Stipe Cotton Gin (White County MPS), Jct. of Florida and Cypress Sts., Beebe, 91001248
Storm Cellar, William Howell House (White County MPS), Co. Rd. 47 E of jct. with AR 305, Clay, 91001295
Thomas House (White County MPS), Co. Rd. 751 NW of Fourmile Hill, Fourmile Hill vicinity, 91001326
Thompson House (White County MPS), Co. Rd. 328 behind Holly Grove Cemetery, Stevens Creek vicinity, 91001341
Thrasher, John, Homestead (White County MPS), Off Co. Rd. 359 W of jct. with US 167, Midway vicinity, 91001362
Titus House (White County MPS), 406 E. Center St., Searcy, 91001240
Trinity Episcopal Church (White County MPS), Jct. of N. Elm and Market Sts., Searcy, 9100119
Van Meter, R. L., House (White County MPS), Jct. of Wade and 14th Sts., Judsonia, 91001233
Walker Homestead Historic Districts (White County MPS), Co. Rd. 56 E of jct. with AR 267, Garner vicinity, 91001351
Walker, Otha, Homestead (White County MPS), AR 36, West Point vicinity, 91001354
Ward—Stout House (White County MPS), Jct. of Front and Walnut Sts., Bradford, 91001313
Walkins House (White County MPS), 1208 E. Race St., Searcy, 91001182I25*Watkins, Tom, House (White County MPS),* Jct. of Oak and Race Sts., Searcy, 91001183
Watson, William Henry, Homestead (White County MPS), Co. Rd. 68 S of Denmark, Denmark vicinity, 91001308
Weber House (White County, MPS) Elm St., Russell, 91001272
Westbrooke, Lipsy, House (White County MPS), 809 W. Center St., Beebe, 91001260
Whisinant, Albert, House (White County MPS), AR 16 N of Mountain Home Mountain Home vicinity, 91001297
Wilburn House (White County MPS), 707 E. Race St., Searcy, 91001177
Williams House (White County MPS), Jct. of Co. Rd. 54 and AR 267, Searcy vicinity, 91001353
Williams, Arthur, Homestead, Feed Storage Shed (White County MPS), Falwell Rd., Bradford vicinity, 91001321
Woodson, Arthur W., House (White County MPS), 1005 W. Arch Ave., Searcy, 91001211
Woodso9n, Dalton, House (White County MPS), 1007 W. Arch Ave., Searcy, 91001212
Wright, Avanell, House (White County MPS), Jct. of Main and Pine Sts., Pangburn, 91001291
Wright, Jim, Farmstead Historic District (White County MPS), AR 258 E of jct. with AR 323, Bald Knob vicinity, 91001284

Connecticut

New London County

Lamb Homestead, 547 Lambtown Rd., Ledyard, 91001175

Illinois

Cook County

East Ravenswood Historic District, Roughly bounded by Lawrence Ave., Clark St., Irving Park Rd. and Ravenswood St., Chicago, 91001364

Massachusetts

Essex County

Nahant Civic Historic District, 332 and 334 Nahant Rd. and 15 Pleasant St., Nahant, 91001174

New Hampshire

Hillsborough County

New Ipswich Center Village Historic District, Roughly bounded by Turnpike Rd., Porter Hill Rd., Main St., NH 123A. Preston Hill, Manley and King Rds., New Ipswich, 91001173

New Jersey

Essex County

Essex County Jail, 21 Wilsey St., Newark, 91001366

Sussex County

Sterling Hill Main, 30 Plant St., Ogdensburg, 91001365

North Carolina

Davie County

Center Arbor, Jct. of US 64 and NC 1150, NW corner, Center, 91001168

Forsyth County

Brickenstein—Leinbach House, 426 Old Salem Rd., Winston-Salem, 91001169
St. Philip's Moravian Church, E side, S. Church St. near Race St., Old Salem, Winston-Salem, 91001170

Guilford County

Ragsdale Farm, 404 E. Main St., Jamestown, 91001171
Wagoner, Simeon, House, 5838 NC 61 (Friedens Church Rd.), Gibsonville vicinity, 91001172

[FR Doc. 91-19477 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-70-M

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirement should be made within 30 days directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–), Washington, DC 20503, telephone 202-395-7340.

Title: Noncoal Reclamation—30 CFR part 875.
OMB Number: 1029– .
Abstract: This Part establishes the procedures and requirements for States and Indian Tribes to create noncoal reclamation programs using Abandoned Mine Land funding. The information is needed to assure compliance with the Surface Mining Control and Reclamation Act.
Bureau Form Number: None.
Frequency: On occasion.
Description of Respondents: State and Indian Tribes.
Estimated Completion Time: 32 hours.
Annual Responses: 5.
Annual Burden Hours: 160.
Bureau Clearance Officer: Richard L. Wolfe (202) 343-5143.

Dated: June 12, 1991.

John P. Mosesso,

Chief, Division of Technical Services.

[FR Doc. 91-19456 Filed 8-14-91; 8:45 am]

BILLING CODE 4310-05-M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related form and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone

number listed below. Comments and suggestions on the requirement should be made within 30 days directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–), Washington, DC 20503, telephone 202–395–7340.

Title: Acid Mine Drainage Abatement and Treatment Program—30 CFR part 876.

OMB Number: 1029–.

Abstract: This part establishes the procedures and requirements for States and Indian Tribes to create an Acid Mine Drainage Abatement and Treatment program. The information is needed to assure compliance with the Surface Mining Control and Reclamation Act.

Bureau Form Number: None.

Frequency: On occasion.

Description of Respondents: State and Indian Tribes.

Estimated Completion Time: 1,040 hours.

Annual Responses: 6.

Annual Burden Hours: 6,240.

Bureau Clearance officer: Richard L. Wolfe (202) 343–5143.

Dated: June 13, 1991.

John P. Mosesso,

Chief, Division of Technical Services.

[FR Doc. 91–19482 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–05–M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the proposal should be made directly to the bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–0061), Washington, DC 20503, telephone 202–395–7340.

Title: Small Operator Assistance Program, Part 795.

OMB approval number: 1029–0061.

Abstract: This information collection requirement is needed to provide assistance to qualified small mine operators under Section 507(c) of the Surface Mining Control and Reclamation Act of 1977. The information requested will provide the regulatory authority with data to determine the eligibility of the applicant for assistance under the Small Operator Assistance Program and the capability and expertise of laboratories to perform the required work.

Bureau Form Number: FS–6.

Frequency: On occasion.

Description of Respondents: Small coal mine operators.

Estimated completion time: 22 hours.

Annual Responses: 1.

Annual Burden Hours: 17,925.

Bureau clearance officer: Richard L. Wolfe, (202) 343–5143.

Dated: June 14, 1991.

John P. Mosesso,

Chief, Division of Technical Services.

[FR Doc. 91–19460 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–05–M

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–0063), Washington, DC 20503, telephone 202–395–7340.

Title: Coal; Production and Reclamation Fee Report, OSM–1.

OMB Number: 1029–0063.

Abstract: In order to ensure compliance with 30 CFR Part 870, a quarterly report is required of coal produced for sale, transfer or use nationwide. Individual reclamation fee payment liability is based on this information.

Bureau Form Number: OSM–1.

Frequency: Quarterly.

Description of Respondents: Coal mine operators.

Annual Responses: 12,660.

Annual Bureau hours: 3,463

Estimated Completion time: 16 mins.

Bureau clearance officer: Richard L. Wolfe, (202) 343–5143.

Dated: June 12, 1991.

John P. Mosesso,

Chief, Division of Technical Services.

[FR Doc. 91–19464 Filed 8–14–91; 8:45 am]

BILLING CODE 4310–05–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 31921]

Boston and Maine Corp. and Springfield Terminal Railway Co.; Modified Rail Certificate

On August 1, 1991, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (ST) filed a notice for a modified certificate of public convenience and necessity under 49 CFR part 1150, subpart C, over an approximately 2.21 mile segment of the so-called Reading Branch between valuation station 179+55, in Medford, MA, and valuation station 296+00, in Melrose, MA.

The line was the subject of an abandonment proceeding in 1971 (Finance Docket No. 26834). It was acquired from B&M in 1973 by the Commonwealth of Massachusetts, through the Massachusetts Bay Transportation Authority (MBTA). B&M/ST and MBTA have entered into an agreement for B&M/ST to operate a through freight service over the involved segment so that B&M/ST may better serve existing customers located on B&M lines.

The Commission will serve a copy of this notice on the Association of American Railroads (Car Service Division), as agent of all railroads subscribing to the car-service and car-hire agreement, and on the American Short Line Railroad Association.

Dated: August 9, 1991.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 91–19466 Filed 8–14–91; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to CERCLA. In United States v. Gurley Refining Co., Inc., et al

In accordance with Department policy, 28 CFR 50.7, notice is hereby given that on August 2, 1991, a proposed Consent Decree in *United States* v, *Gurley Refining Co., Inc.*, Civil Action No. J–C–87–291 was lodged with the

United States District Court for the Eastern District of Arkansas.

The Complaint in this enforcement action was filed on November 18, 1987, against various entities including R.A. Caldwell under section 107 of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. 9607, seeking reimbursement of costs incurred by the United States in responding to the release or threat of release of hazardous substances form the Gurley Pit Site in Edmonson Arkansas. The proposed consent decree between the United States and R.A. Caldwell releases R.A. Caldwell from liability to the United States in exchange for a payment of $90,000.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Washington, DC 20530, and should refer to *United States* v. *The Gurley Refining Co., Inc.*, (DOJ # 90-11-2-196).

The proposed Consent Decree may be examined at the office of the United States Attorney, Eastern District of Arkansas, 331 Post Office and Courthouse Bld. Little Rock, Arkansas 72901 and the United States Environmental Protection Agency, Region VI, 1445 Ross Ave. Dallas, Texas 75202-2733. Copies of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004, (202) 347-2072. In requesting a copy, please enclose a check in the amount of $3.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Barry M. Hartman,

Acting Assistant Attorney General, Environmental and Natural Resources Division.

[FR Doc. 91-19492 Filed 8-14-91; 8:45 am]

BILLING CODE 4410-01-M

Lodging a Final Judgment by Consent Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on July 31, 1991, a proposed Consent Decree in *United States of America* v. *Lord Corporation* Civil Action No. 91-177(E), was lodged with the United States District Court for the Western District of Pennsylvania.

The proposed Consent Decree resolves the liability of Defendant Lord Corporation ("Defendant") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the groundwater contamination at the Lord-Shope Landfill Superfund Site ("the Site"), Erie County, Pennsylvania. The Consent Decree requires Defendant to implement the June 29, 1990, Record of Decision. The Record of Decision provides for remediation of groundwater contamination at the site by requiring: (1) Pumping of the groundwater and treatment of the groundwater by airstripping, (2) in situ vapor stripping of the landfill and surrounding soils to remove volatile organic compounds ("VOC"s), and (3) institutional controls and security fencing to restrict exposure to contaminated water and soils. The remedial objectives set forth in the June 29, 1990, Record of Decision are to resolve the groundwater contamination at the Site and to reduce the source of contamination, to minimize potential exposure of groundwater contaminants to the public and to the evironment and to make potential future well water supplies available. Under the Decree, Defendant agrees to pay the United States $218,415.21 in settlement of the Federal government's claim for reimbursement of past response costs incurred by EPA at the Site. Defendant also agrees to pay all future oversight costs to be incurred by the United States at the Site overseeing the implementation of work under the Decree.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States of America* v. *Lord Corporation* (DOJ No. 90-11-2-593).

The proposed Consent Decree may be examined at the office of the United States Attorney for the Western District of Pennsylvania, 1400 Gulf Tower, 7th and Grant Streets, Pittsburgh, Pennsylvania, 15219, and the U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107. The Decree may also be examined at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004, 202-347-2072. A copy of the proposed Consent Decree may be obtained in person or by mail from the Document Center. In requesting a copy of the proposed Consent Decree, please enclose a check in the amount of $37.25 (25 cents per page reproduction cost) payable to Consent Decree Library.

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 91-19401 Filed 8-14-91; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Proposed Termination of Final Judgment

Notice is hereby given that defendants Saks & Company and Bergdorf Goodman Inc. have filed with the United States District Court for the Southern District of New York a motion to terminate the Final Judgment in *United States* v. *Saks & Company, et al.*, 74 Civ. 4391, and the Department of Justice ("Department"), in a stipulation also filed with the Court, has consented to termination of the Final Judgment, but has reserved the right to withdraw its consent based on public comments or for other reasons. The Complaint in this case (filed on October 7, 1974) alleged that Saks & Company, Berdorf Goodman Inc. and a third defendant, Genesco Inc., had combined and conspired to raise, fix, stabilize and maintain retail prices of women's clothing. The Complaint further alleged that the defendants, for the purpose of forming and effectuating the conspiracy, among other things, established uniform prices through the adoption of uniform markup lists and induced manufacturers to use such uniform retail prices as manufacturer's suggested retail prices.

The Final Judgment (entered on June 7, 1977, and later amended on May 2, 1983), prohibits each defendant store from directly or indirectly entering into, adhering to or enforcing any agreement or understanding with any other person to raise, fix or establish prices (including manufacturers' suggested retail prices), markups, dates for price reductions or markups, or other terms or conditions in the retail sale of women's clothing. The Final Judgment also generally prohibits the defendant stores from directly or indirectly communicating to any manufacturer or other retailer of women's clothing these same types of retail price-related information.

The Department has filed with the Court a memorandum setting forth the reasons why the Department believes that termination of the Final Judgment would serve the public interest. Copies of the Complaint, Final Judgment, the

Department's Memorandum, motion papers and all further papers filed with the Court in connection with this motion will be available for inspection at room 3233, Antitrust Division, Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530 (telephone: 202–514–2481), and at the Office of the Clerk of the United States District Court for the Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007. Copies of any of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by the Department of Justice regulations.

Interested persons may submit comments regarding the proposed termination of the Final Judgment to the Department. Such comments must be received within the sixty-day period established by Court order, and will be filed with the Court by the Department. Comments should be addressed to Ralph T. Giordano, Chief, New York Office, Antitrust Division, Department of Justice, New York, New York 10278 (telephone: 212–264–0390).

Joseph H. Widmar,
Director of Operations, Antitrust Division.

[FR Doc. 91–19400 Filed 8–14–91; 8:45 am]
BILLING CODE 4410-01-M

National Institute of Corrections

Announcement of Grants, Services, and Training

The National Institute of Corrections, U.S. Department of Justice, has published its Annual Program Plan for Fiscal Year 1992. The document describes the services and grant monies available beginning October 1, 1991, as well as training that will be provided by the Institute's National Academy of Corrections. Those interested in obtaining a copy of the Annual Program Plan may contact the National Institute of Corrections, 320 First Street, NW., Washington, DC 20534 (telephone 202–307–3106) or its Academy or Jail Center, 1790 30th Street, Boulder, CO 80301 (telephone 303–939–8855 or 8866, respectively).

M. Wayne Huggins,
Director.

[FR Doc. 91–19501 Filed 8–14–91; 8:45 am]
BILLING CODE 4410-36-M

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

[Application Number D-8411]

Proposed Amendment to Prohibited Transaction Exemption (PTE) 89–13 Involving Coldwell Banker Commercial Group (CBCG)

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of proposed amendment to PTE 89–13.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to PTE 89–13. PTE 89–13 permits certain transactions between CBCG, its affiliates and certain employee benefit plans (the Plans), provided specified conditions are met. These transactions are described in the grant of exemption published on March 15, 1989 (54 FR 10747). The proposed amendment, if granted, would: (1) Permit the replacement of Coldwell Banker Real Estate Trust Services (the Trust Company) as the custodial trustee identified in PTE 89–13; (2) reflect the recent change in the names of CBCG and certain affiliates; and (3) permit the application of the exemption to investment funds designed to invest in fixed interest rate commercial real estate mortgage loans.

DATES: Written comments and requests for a hearing should be received by the Department on or before (September 30, 1991.

EFFECTIVE DATE: The proposed amendment to PTE 89–13, if granted, will be effective as of August 15, 1991.

ADDRESSES: All written comments and requests for a hearing (preferably at least three copies) should be sent to: Office of Exemption Determinations, Pension and Welfare Benefits Administration, room N–5671, Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Attention: Coldwell Banker. The application pertaining to the exemptive relief proposed herein (Application D–8411) and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, room N–5507, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Mr. David Lurie of the Office of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor, (202) 523–7901.

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed amendment to PTE 89–13. PTE 89–13 provides an exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code) by reason of certain provisions of section 4975(c)(1) of the Code.

The amendment to PTE 89–13 proposed herein was requested by CBCG. The Department is proposing to amend PTE 89–13 pursuant to section 408(a) of ERISA and section 4975(c)(2) of the Code* and in accordance with ERISA Procedure 75–1 (40 FR 18471 April 28, 1975).

PTE 89–13 provides exemptive relief from the prohibited transaction provisions of section 406 of the Act in connection with single-customer trust accounts (Managed Trust Accounts) and common or collective trusts (Common Trusts) sponsored and maintained by CBCG or its affiliates, in which benefit plans invest, and which invest in equity interests in income-producing real property and mortgage loans convertible into equity interests in such real property. The Trust Company, an affiliate of CBCG, was designated as the trustee of the Common Trusts and Managed Trust Accounts (collectively, the Trusts) and an affiliate of both CBCG and the Trust Company was employed by the Trust Company to perform investment management services for the Trusts. The applicant represented that Coldwell Banker Capital Management Services, Inc. (CBCMS) would be employed by the Trust Company to perform these investment management services.

CBCG has informed the Department that it was sold by Sears, Roebuck & Co. (Sears) to CB Commercial Holdings, Inc. (CB Commercial). Pursuant to the terms of the sale, the name of Coldwell Banker Commercial Group or CBCG has been changed to CB Commercial Real Estate Group, Inc. (CBCR) and Coldwell Banker Capital Management Services, Inc. CBCMS has been changed to CB Commercial Realty Advisors, Inc. (CB Advisors). In addition, the banking license under which the Trust Company operated was transferred to CB Commercial. Under California banking law, that transfer requires that the

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*Section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 18, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), transferred the authority of the Secretary of the Treasury to issue exemptions of this type to the Secretary of Labor.

California Superintendent of Banks approve the operation of the Trust Company under the transferred license. The applicant represents that it is unsure when, and if, the requisite approval will be granted. In order to continue operating the Common Trusts and Managed Trust Accounts described in PTE 89–13, CBCG (hereinafter CBCR) has requested that PTE 89–13 be amended to provide that CB Advisors would be designated as the investment manager for the Trusts and that a bank, independent of CB Commercial and affiliates, which meets the qualifications required of a Qualified Professional Asset Manager pursuant to section v(a)(1) of Prohibited Transaction Exemption 84–14 (PTE 84–14, 50 FR 9494, 9506) would be designated as a custodial trustee for the Trusts (Custodian). As a result, such custodial trustee would be restricted to being a bank, as defined in section 202(a)(2) of the Investment Advisors Act of 1940,, which bank has equity capital in excess of $1,000,000. The applicant represents that the conditions of PTE 89–13 will continue to be satisfied following the designation of CB Advisors as investment manager and a Custodian as custodial trustee and that these designations will result in no additional fees being charged to the Trusts. The subscription fee, the management fee and the disposition fee as described in PTE 89–13 would remain unchanged with respect to the Trusts, with a Custodian's fees paid out of those fees. No additional exemptive relief is necessary as a result of the designations described herein.

In the application for PTE 89–13, the applicant represented that the Managed Trust Accounts and the Common Trust Accounts would invest only in equity real estate or in convertible mortgages. However, the applicant represents that it has recently decided to offer as investments to pension plans single customer and pooled trust accounts (Mortgage Accounts and Mortgage Funds respectively, together, Funds) that would make fixed interest rate mortgage loans secured by commercial real estate which would be originated through Coldwell Banker Commercial Mortgage Banking Services, a division of CBCR, as agent for the Funds. As a result, the applicant has requested that the exemption be amended to include Mortgage Accounts and Mortgage Funds which make fixed interest rate mortgages secured by commercial real estate and originated through Coldwell Banker Commercial Mortgage Banking Services, a division of CBCR.

Origination fees charged to borrowers will be paid directly to the Fund or Account which is making the loan. Mortgage Accounts and Mortgage Funds would make loans with terms of 5, 7, or 10 years, and such Funds will have a term of not less than 10 years. The Mortgage Accounts and Funds will be closed-ended with a limited subscription period, and self-liquidating with all payments of interest and principal distributed to investing plans rather than reinvested. A Mortgage Account or Fund would be organized and operated in a manner nearly identical to a Managed Trust Account or a Common Trust, respectively. The differences would be that a Mortgage Account or Fund would invest in fixed rate conventional mortgages, rather than real estate equity or convertible mortgages, and that the services provided by CBCMS (hereinafter CB Advisors) would include mortgage brokerage and loan servicing rather than real estate brokerage and property management. The fees charged by CB Advisors to a Mortgage Account or Fund would be a front-end subscription fee and an ongoing "management fee". The management fee consists of a fixed amount plus a percentage of the outstanding principle balance of the portfolio's loans. No disposition fee would be charged by CB Advisors nor paid by investing plans or the Mortgage Account or Fund. The applicant represents that the fees to be charged with respect to the Mortgage Accounts and Funds will be significantly lower than those charged with respect to the Trusts to reflect the reduced workload involved in servicing commercial mortgage loans versus managing real estate.

CB Advisors, formerly CBCMS, will operate as the investment manager for the Common Trusts and Managed Trust Accounts, as well as for the Mortgage Accounts and Funds. The applicant represents that CB Advisors has been and remains a Qualified Professional Asset Manager as defined in PTE 84–14. As custodial trustee, a Custodian will hold title to Trust and Fund assets, manage cash accounts, and make disbursements from the Trusts and the Funds, including the payment of fees to CB Advisors, other CBCR affiliates and independent service providers. CB Advisors will exercise all discretionary authority with respect to the management of the Trusts, the Funds and their assets. In addition, CB Advisors will prepare or oversee the preparation of financial and other reports required by PTE 89–13. The applicant represents that the conditions of PTE 89–13 will be met in the operation of the Mortgage Accounts and Funds. The Mortgage Accounts and Funds will operate in the same manner as the Managed Trust Accounts and Common Trusts, but there will be no disposition fee charged to the Funds.

Based on the foregoing representations, the Department has decided to propose an amendment to PTE 89–13 by replacing references therein to CBCMS with CBCR and CB Advisors, respectively, and by replacing references to the Trust Company with CB Advisors or Custodian as appropriate, and to include references to the Funds or Mortgage Accounts, as appropriate.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975 of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the participants and beneficiaries of the plan; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The amendments are supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

Written Comments and Hearing Request

All interested persons are invited to submit written comments or requests for a public hearing on the proposed amendments to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed amendments. Comments received will be available for public inspection with the referenced application at the above address.

Proposed Amendment

Under section 408(a) of ERISA and section 4975(c)(2) of the Code and in accordance with ERISA Procedure 75-1, the Department proposes to amend PTE 89-13 as set forth below.

Exemption

Part I—Exemption for Certain Transactions Involving investment in a Managed Trust Account or Mortgage Account

The restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(C)(1)(A) through (D) of the Code shall not apply to employee benefit plan (Participating Plan) investment in a trust account designed to invest in equity interests or mortgage loans convertible to equity interests in real estate (Managed Trust Account) or to invest in fixed interest rate commercial mortgage loans (Mortgage Account) which is not commingled with the assets of other trust accounts where the Custodian serves as custodial trustee and CB Commercial Realty Advisors, Inc. (CB Advisors) renders investment management services, provided that:

(a) Each investment is authorized in writing by a fiduciary of a Participating Plan who is independent of the Custodian or CB Advisors and any of their affiliates; and

(b) The applicable General Conditions of Part V are met.

Part II—Exemption for Certain Transactions Involving Parties in Interest and Common Trusts or Mortgage Funds

The restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any transaction between a party in interest with respect to a Participating Plan and a common or collective trust designed to invest in equity interests or mortgage loans convertible to equity interests in real estate (Common Trust) or to invest in fixed interest rate commercial mortgage loans (Mortgage Fund) for which the Custodian serves as custodial trustee and CB Advisors renders investment management services if the applicable General Conditions of part V are met and, at the time of the transaction, the Participating Plan in such Common Trust or Mortgage Fund together with the interests of any other plans maintained by the same employer and/or employee organization in the Common Trust or Mortgage Fund do not exceed 10 percent of the total of all assets in the Common Trust or Mortgage Fund.

Part III—Exemption for Certain Transactions Between Common Trusts or Managed Trust Accounts and CB Advisors or its Affiliates

The restrictions of section 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to the transaction described below, if the General Conditions of part V are satisfied.

The payment to CB Advisors of disposition fees (Disposition Fees) under the terms established in the respective Trust Agreement covering the Common Trust or Managed Trust Account (and as described in the summary of facts and representations of the proposed exemption for PTE 89-13, (54 FR 702 January 9, 1989)), provided that the payment and terms of such Disposition Fees shall have been approved by an independent fiduciary of the plan at the time the Trust Agreement was entered into and that the total of all fees paid to CB Advisors constitute no more than reasonable compensation.

Part IV—Exemption for Certain Transactions Between Joint Ventures or Partnerships and CBCR or its Affiliates

The restrictions of section 406(b)(3) of the Act and the taxes imposed by section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(F) of the Code, shall not apply to the transaction described below:

The payment of fees or commissions to CBCR or its affiliates by partnerships or joint ventures in which a Common Trust or Managed Trust Account is a partner or joint venturer or by an entity with respect to which a Common Trust or Managed Trust Account has made a loan which is convertible into equity, for Management Services furnished with respect to such partnership or joint venture; provided that the applicable General Conditions of part V are satisfied and the following conditions are met:

(a) The fees or commissions paid to CBCR or its affiliates are reasonable;

(b) A party which is not affiliated with the Custodian or CBCR or any of their affiliates and which has an equity interest in excess of 10 percent in the partnership, joint venture or the entity to which the loan was made makes the decision to hire the service provider;

(c) Neither the Custodian nor CBCR nor any of their affiliates have the power to exercise control over the selection of the service provider (other than through the exercise of a veto for reasonable cause); and

(d) The portion of any fee received by CBCR or an affiliate from the partnership or joint venture for which the Common Trust or Managed Trust Account is responsible due to its proportionate interest in the partnership or joint venture will be applied as a credit to the Management Fee paid to CB Advisors by the Common Trust or Managed Trust Account.

Part V—General Conditions

(a) All transactions are on terms and conditions that are at least as favorable to the Managed Trust Account(s), Mortgage Account(s), Common Trust(s), and Mortgage Fund(s) as those in arm's-length transactions between unrelated parties would be.

(b) No plan subject to the provisions of title I of the Act or to section 4975 of the Code may invest in a Common Trust or Mortgage Fund or establish a Managed Trust Account or Mortgage Account unless the plan has total net assets with a value in excess of $50,000,000 and no such plan may invest more than 5 percent of its assets in any one Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account, or more than 10 percent of its assets in Trust Accounts and Funds established by the Custodian or CB Advisors or any of their affiliates.

(c) Prior to making an investment in a Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account, a fiduciary for the plan independent of CBCR, the Custodian and their affiliates receives offering materials which disclose all material facts concerning the purpose, structure and operation of such Trust, Fund, Trust Account, or Mortgage Account in which it participates.

(d) Each Participating Plan shall receive the following with respect to any Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account in which it participates:

(1) Audited Financial Statements, prepared by independent public accountants selected by CB Advisors, not later than 90 days after the end of the Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account fiscal year.

(2) Quarterly reports prepared by CB Advisors relating to the overall financial position and operating results of the Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account which will include all fees paid by the Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account and by any partnerships or

joint ventures in which the Common Trust or Managed Trust Account is invested.

(3) Annual estimates prepared by CB Advisors of the current fair market value of all assets owned by the Common Trust, Mortgage Fund, Managed Trust Account, or Mortgage Account.

(4) Copies of the quarterly reports which the Custodian is required to file with the Superintendent of Banks of the state in which the bank is established, and an immediate report with regard to any finding by such Superintendent of Banks involving inappropriate fiduciary behavior with respect to any Managed Trust Account, Common Trust, or Mortgage Fund or Account.

(5) In the case of a Common Trust or Mortgage Fund, a list of all of the other investors in the Common Trust or Mortgage Fund.

(e) The Custodian or CB Advisors or any of their affiliates shall maintain, for a period of six years, the records necessary to enable the persons described in subsection (f) of this part V to determine whether the conditions of this exemption have been met, except that (i) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of the Custodian or CB Advisors or any of their affiliates, the records are lost or destroyed prior to the end of the six year period, and (ii) no party in interest other than the Custodian or CB Advisors shall be subject to the civil penalty that may be assessed under section 503(i) of the act or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by subsection (f) below.

(f) Notwithstanding any provisions of section 504(a)(2) and (b) of the Act,

The records referred to in subsection (e) of this part V shall be unconditionally available at their customary location for examination during normal business hours by:

(1) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the relevant Superintendent of Banks;

(2) Any fiduciary of a Participating Plan or any duly authorized employee or representative of such fiduciary;

(3) Any contributing employer to any Participating Plan or any duly authorized employee or representative of such employer; and

(4) Any participant or beneficiary of any Participating Plan, or any duly authorized employee or representative of such participant or beneficiary.

Part VI—Definitions and General Rules

For the purposes of this exemption:

(a) An "affiliate" of a person includes:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by or under common control with the person;

(2) Any officer, director, employee, relative of, or partner in any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(b) The term *control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term *Custodian* means a bank, as defined in section 202(a)(2) of the Investment Advisors Act of 1940, which bank has, as of the last day of its most recent fiscal year, equity capital (as defined in section V(k) of PTE 84–14) in excess of $1,000,000, and which is not an affiliate of CBCR.

(d) The term *Management Services* means:

(1) Services of real estate brokers and finders in connection with the acquisition or disposition of real property or interests therein, or the services of mortgage brokers in connection with the making of mortgage loans secured by commercial real estate.

(2) Services of property managers, or loan servicers.

(3) Services of leasing agents in connection with obtaining leases on properties owned by the Common Trust or Managed Trust Account.

(e) The term *relative* means a "relative" as that term is defined in section 3(15) of the Act (or a member of the "family" as that term is defined in section 4975(e)(6) of the Code), or a brother, sister, or a spouse of a brother or sister.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions which are the subject of this exemption.

For a more complete statement of the facts and representations supporting the Department's decision to grant PTE 89–13 refer to the notice of proposed exemption published on January 9, 1989 at 54 FR 702.

Signed at Washington, DC, this 9th day of August 1991.

Ivan L. Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 91–19421 Filed 8–14–91; 8:45 am]

BILLING CODE 4510–29–M

[Application No. D–8749, et al.]

Proposed Exemptions; Daiwa Securities America, Inc., et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restriction of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, by September 30, 1991. Comments and request for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N–5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5507, 200 Constitution Avenue, NW., Washington, DC 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Daiwa Securities America, Inc. (Daiwa) Located in New York, New York

[Application No. D-8749]

Proposed Exemption

I. Transactions

A. Effective January 1, 1991, the restrictions of sections 406(a) and 407(a) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to the following transactions involving trusts and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and an employee benefit plan when the sponsor, servicer, trustee or insurer of a trust, the underwriter of the certificates representing an interest in the trust, or an obligor is a party in interest with respect to such plan;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates; and

(3) The continued holding of certificates acquired by a plan pursuant to subsection I.A.(1) or (2).

Notwithstanding the foregoing, section I.A does not provide an exemption from the restrictions of sections 406(a)(1)(E), 406(a)(2) and 407 for the acquisition or holding of a certificate on behalf of an Excluded Plan by any person who has discretionary authority or renders investment advice with respect to the assets of that Excluded Plan.[1]

B. Effective January 1, 1991, the restrictions of sections 406(b)(1) and 406(b)(2) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code shall not apply to:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor or underwriter and a plan when the person who has discretionary authority or renders investment advice with respect to the investment of plan assets in the certificates is (a) an obligor with respect to 5 percent or less of the fair market value of obligations or receivables contained in the trust, or (b) an affiliate of a person described in (a); if:

(i) The plan is not an Excluded Plan;

(ii) solely in the case of an acquisition of certificates in connection with the initial issuance of the certificates, at least 50 percent of each class of certificates in which plans have invested is acquired by persons independent of the members of the Restricted Group and at least 50 percent of the aggregate interest in the trust is acquired by persons independent of the Restricted Group;

(iii) A plan's investment in each class of certificates does not exceed 25 percent of all of the certificates of that class outstanding at the time of the acquisition; and

(iv) Immediately after the requisition of the certificates, no more than 25 percent of the assets of a plan with respect to which the person has discretionary authority or renders investment advice are invested in certificates representing an interest in a trust containing assets sold or serviced by the same entity.[2] For purposes of this paragraph B.(1)(iv) only, an entity will not be considered to service assets contained in a trust if it is merely subservicer of that trust;

(2) The direct or indirect acquisition or disposition of certificates by a plan in the secondary market for such certificates, provided that the conditions set forth in paragraphs B.(1) (i), (iii) and (iv) are met; and

(3) The continued holding of certificates acquired by a plan to subsection I.B. (1) or (2).

C. Effective January 1, 1991, the restrictions of section 406(a), 406(b) and 407(a) of the Act, and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(a) of the code, shall not apply to transactions in connection with the servicing, management and operation of a trust; provided:

(1) Such transactions are carried out in accordance with the terms of a binding pooling and servicing arrangement; and

(2) The pooling and servicing agreement is provided to, or described in all material respects in the prospectus or private placement memorandum provided to, investing plans before they purchase certificates issued by the trust.[3]

Notwithstanding the foregoing, section I.C. does not provide an exemption from the restrictions of section 406(b) of the Act or from the taxes imposed by reason of section 4975(c) of the Code for the receipt of a fee by a servicer of the trust from a person other than the trustee or sponsor, unless such fee constitutes a "qualified administrative fee" as defined in section III.S.

D. Effective January 1, 1991, the restrictions of sections 406(a) and 407(a) of the Act, and the taxes imposed by sections 4975 (a) and (b) of the Code by reason of sections 4975(c)(1)(A) through (D) of the Code, shall not apply to any transactions to which those restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest or disqualified person (including a fiduciary) with respect to a plan by virtue of providing a fiduciary) with respect to a plan by virtue of

[1] Section I.A. provides no relief from sections 406(a)(1)(E), 406(a)(2) and 407 for any person rendering investment advice to an Excluded Plan within the meaning of section 3(21)(A)(ii) and regulation 29 CFR 2510.3–21(c).

[2] For purposes of this exemption, each plan participating in a commingled fund (such as a bank collective trust fund or insurance company pooled separate account) shall be considered to own the same proportionate undivided interest in each asset of the commingled fund as its proportionate interest in the total assets of the commingled fund as calculated on the most recent preceding valuation date of the fund.

[3] In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the certificates were made in a registered pubic offering under the Securities Act of 1933. In the Department's view, the private placement memorandum must contain sufficient information to permit plan fiduciaries to make informed investment decisions.

providing services to the plan (or by virtue of having a relationship to such service provider described in section 3(14) (F), (G) (H) or (I) of the Act or section 4975(e)(2) (F), (G), (H) or (I) of the Code), solely because of the plan's ownership of certificates.

II. General Conditions

A. The relief provided under part I is available only if the following conditions are met:

(1) the acquisition of certificates by a plan is on terms (including the certificate price) that agree at least as favorable to the plan as they would be in an arm's-length transaction with an unrelated party;

(2) The rights and interests evidenced by the certificates are not subordinated to the rights and interests evidenced by other certificates of the same trust;

(3) The certificates acquired by the plan have received a rating at the time of such acquisition that is in one of the three highest generic rating categories from either Standard & Poor's Corporation (S&P's), Moody's Investors Service, Inc. (Moody's), Duff & Phelps Inc. (D & P) or Fitch Investors Service, Inc. (Fitch);

(4) The trustee is not an affiliate of any member of the Restricted Group. However, the trustee shall not be considered to be an affiliate of a servicer solely because the trustee has succeeded to the rights and responsibilities of the servicer pursuant to the terms of a pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the servicer;

(5) The sum of all payments made to and retained by the underwriters in connection with the distribution or placement of certificates represents not more than reasonable compensation for underwriting or placing the certificates; the sum of all payments made to and retained by the sponsor pursuant to the assignment of obligations (or interests therein) to the trust represents not more than the fair market value of such obligations (or interests); and the sum of all payments made to and retained by the servicer represents not more than reasonable compensation for the servicer's services under the pooling and servicing agreement and reimbursement of the servicer's reasonable expenses in connection therewith; and

(6) The plan investing in such certificates is an "accredited investor" as defined in Rule 501(a)(1) of Regulation D of the Securities and Exchange Commission under the Securities Act of 1933.

B. Neither any underwriter, sponsor, trustee, servicer, insurer, or any obligor, unless it or any of its affiliates has discretionary authority or renders investment advice with respect to the plan assets used by a plan to acquire certificates, shall be denied the relief provided under part I, if the provision of subsection II.A.(6) above is not satisfied with respect to acquisition on holding by a plan of such certificates, provided that (1) such condition is disclosed in the prospectus or private placement memorandum; and (2) in the case of a private placement of certificates, the trustee obtains a representation from each initial purchaser which is a plan that it is in compliance with such condition, and obtains a covenant from each initial purchaser to the effect that, so long as such initial purchaser (or any transferee of such initial purchaser's certificates) is required to obtain from its transferee a representation regarding compliance with the Securities Act of 1933, any such transferees will be required to make a written representation regarding compliance with the condition set forth in subsection II.A.(6) above.

III. Definitions

For purposes of this exemption:

A. *Certificate* means:

(1) A certificate

(a) That represents a beneficial ownership interest in the assets of a trust; and

(b) That entitles the holder to pass-through payments of principal, interest, and/or other payments made with respect to the assets of such trust; or

(2) A certificate denominated as a debt instrument—

(a) That represents an interest in a Real Estate Mortgage Investment Conduit (REMIC) within the meaning of section 860D(a) of the Internal Revenue Code of 1986; and

(b) That is issued by and is an obligation of a trust; with respect to certificates defined in (1) and (2) for which Daiwa or any of its affiliates is either (i) the sole underwriter or the manager or co-manager of the underwriting syndicate, or (ii) a selling or placement agent.

For purposes of this exemption, references to "certificates representing an interest in a trust" include certificates denominated as debt which are issued by a trust.

B. *Trust* means an investment pool, the corpus of which is held in trust and consists solely of:

(1) Either

(a) Secured consumer receivables that bear interest or are purchased at a discount (including, but not limited to, home equity loans and obligations secured by shares issued by a cooperative housing association);

(b) Secured credit instruments that bear interest or are purchased at a discount in transactions by or between business entities (including, but not limited to, qualified equipment notes secured by leases, as defined in section III.T);

(c) Obligations that bear interest or are purchased at a discount and which are secured by single-family residential, multi-family residential and commercial real property, (including obligations secured by leasehold interests on commercial real property);

(d) Obligations that bear interest or are purchased at a discount and which are secured by motor vehicles or equipment, or qualified motor vehicle leases (as defined in section III.U);

(e) *Guaranteed governmental mortgage pool certificates,* as defined in 29 CFR section 2510.3–101(i)(2);

(f) Fractional undivided interests in any of the obligations described in clauses (a)–(e) of this section B.(1);

(2) Property which had secured any of the obligations described in subsection B.(1);

(3) Undistributed cash or temporary investments made therewith maturing no later than the next date on which distributions are to made to certificateholders; and

(4) Rights of the trustee under the pooling and servicing agreements, and rights under any insurance policies, third-party guarantees, contracts and suretyship and other credit support arrangements with respect to any obligations described in subsection B.(1).

Notwithstanding the foregoing, the term "trust" does not include any investment pool unless: (1) The investment pool consists only of assets of the type which have been included in other investment pools, (ii) certificates evidencing interests in such other investment pools have been rated in one of the three highest generic rating categories by S&P's, Moody's, D & P, or Fitch for at least one year prior to the plan's acquisition of certificates pursuant to this exemption, and (iii) certificates evidencing interests in such other investment pools have been purchased by investors other than plans for at least one year prior to the plan's acquisition of certificates pursuant to this exemption.

C. *Underwriter* means:

(1) Daiwa;

(2) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with Daiwa; or

(3) Any member of an underwriting syndicate or selling group of which Daiwa or a person described in (2) is a manager or co-manager with respect to the certificates.

D. *Sponsor* means the entity that organizes a trust by depositing obligations therein in exchange for certificates.

E. *Master Servicer* means the entity that is a party to the pooling and servicing agreement relating to trust assets and is fully responsible for servicing, directly or through subservicers, the assets of the trust.

F. *Subservicer* means an entity which, under the supervision of and on behalf of the master servicer, services loans contained in the trust, but is not a party to the pooling and servicing agreement.

G. *Servicer* means any entity which services loans contained in the trust, including the master servicer and any sub-servicer.

H. *Trustee* means the trustee of the trust, and in the case of certificates which are denominated as debt instruments, also means the trustee of the indenture trust.

I. *Insurer* means the insurer or guarantor of, or provider of other credit support for, a trust.

Notwithstanding the foregoing, a person is not an issuer solely because it holds securities representing an interest in a trust which are of a class subordinated to certificates representing an interest in the same trust.

J. *Obligor* means any person, other than the insurer, that is obligated to make payments with respect to any obligation or receivable included in the trust. Where a trust contains qualified motor vehicle leases or qualified equipment notes secured by leases, "obligor" shall also include any owner of property subject to any lease included in the trust, or subject to any lease securing an obligation included in the trust.

K. *Excluded Plan* means any plan with respect to which any member of the Restricted Group is a "plan sponsor" within the meaning of section 3(16)(B) of the Act.

L. *Restricted Group* with respect to a class of certificates means:

(1) Each underwriter;

(2) Each insurer;

(3) The sponsor;

(4) The trustee;

(5) Each servicer;

(6) Any obligor with respect to obligations or receivables included in the trust constituting more than 5 percent of the aggregate unamortized principal balance of the assets in the trust, determined on the date of the initial issuance of certificates by the trust; or

(7) Any affiliate of a person described in (1)–(6) above.

M. Affiliate of another person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(2) Any officer, director, partner, employee, relative (as defined in section 3(15) of the Act), a brother, a sister, or a spouse of a brother or sister of such other person; and

(3) Any corporation or partnership of which such other person is an officer, director or partner.

N. *Control* means the power to exercise a controlling influence over the management or policies of a person other than an individual.

O. A person will be "independent" of another person only if:

(1) Such person is not an affiliate of that other person; and

(2) The other person, or an affiliate thereof, is not a fiduciary who has investment management authority or renders investment advice with respect to any assets of such person.

P. *Sale* includes the entrance into a forward delivery commitment (as defined in section Q below), provided:

(1) The terms of the forward delivery commitment (including any fee paid to the investing plan) are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party;

(2) The prospectus or private placement memorandum is provided to an investing plan prior to the time the plan enters into the forward delivery commitment; and

(3) At the time of the delivery, all conditions of this exemption applicable to sales are met.

Q. *Forward delivery commitment* means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date. The term includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificate from, the other party).

R. *Reasonable compensation* has the same meaning as that term is defined in 29 CFR 2550.408c–2.

S. *Qualified Administrative Fee* means a fee which meets the following criteria:

(1) The fee is triggered by an act or failure to act by the obliger other than the normal timely payment of amounts owing in respect of the obligations;

(2) The servicer may not charge the fee absent the act or failure to act referred to in (1);

(3) The ability to charge the fee, the circumstances in which the fee may be charged, and an explanation of how the fee is calculated are set forth in the pooling and servicing agreement; and

(4) The amount paid to investors in the trust will not be reduced by the amount of any such fee waived by the servicer.

T. *Qualified Equipment Note Secured By A Lease* means an equipment note:

(a) Which is secured by equipment which is leased;

(b) Which is secured by the obligation of the lessee to pay rent under the equipment lease; and

(c) With respect to which the trust's security interest in the equipment is at least as protective of the rights of the trust as the trust would have if the equipment note were only by the equipment and not the lease.

U. *Qualified Motor Vehicle Lease* means a lease of a motor vehicle where:

(a) The trust holds a security interest in the lease;

(b) The trust holds a security interest in the leased motor vehicle; and

(c) The trust's security interest in the leased motor vehicle is at least as protective of the trust's rights as the trust would receive under a motor vehicle installment loan contract..

V. *Pooling and Servicing Agreement* means the agreement or agreements among a sponsor, a servicer and the trustee establishing a trust. In the case of certificates which are denominated as debt instruments, "Pooling and Servicing Agreement" also includes the indenture entered into by the trustee of the trust issuing such certificates and the indenture trustee.

Effective Date: This exemption, if granted, will be effective for transactions occurring on or after January 1, 1991.

II. Summary of Facts and Representations

1. Daiwa is an international investment banking firm providing financial advice to, and raising capital for, a broad range of domestic clients. Daiwa and its affiliates manage and participate in public offerings and arrange direct placements of debt and equity securities in the domestic and international capital markets. Such securities include common stock, preferred stock, asset-backed securities and mortgage-related securities. Daiwa also underwrites short-term and

medium-term securities. Daiwa is a subsidiary of Daiwa Securities Ltd.

Trust Assets

2. Daiwa seeks exemptive relief to permit plans to invest in pass-through certificates representing undivided interests in the following categories of trusts: (1) Single and multi-family residential or commercial mortgage investment trusts;[4] (2) motor vehicle receivable investment trusts; (3) consumer or commercial receivables investment trusts; and (4) guaranteed governmental mortgage pool certificate investment trusts.[5]

3. Commercial mortgage investment trusts may include mortgages on ground leases of real property. Commercial mortgages are frequently secured by ground leases on the underlying property, rather than by fee simple interests. The separation of the fee simple interest and the ground lease interest is generally done for tax reasons. Properly structured, the pledge of the ground lease to secure a mortgage provides a lender with the same level of security as would be provided by a pledge of the related fee simple interest. The terms of the ground leases pledged to secure leasehold mortgages will in all cases be at least ten years longer than the term of such mortgages.

Trust Structure

4. Each trust is established under a pooling and servicing agreement among a sponsor, a servicer and a trustee. The sponsor or servicer of a trust selects assets to be included in the trust. These assets are receivables which may have been originated by a sponsor or servicer of the trust, an affiliate of the sponsor or servicer, or by an unrelated lender and subsequently acquired by the trust sponsor or servicer.

Prior to or concurrently with the closing date, the sponsor acquires legal title to all assets selected for the trust, establishes the trust and designates an independent entity as trustee. On the closing date, the sponsor conveys to the trust legal title to the assets, and the trustee issues certificates representing fractional undivided interests in the trust assets. Daiwa, alone or together with other broker-dealers, acts as underwriter or placement agent with respect to the sale of the certificates. The majority of the public offerings of certificates made to date have been underwritten on a firm commitment basis. In addition, Daiwa has privately placed certificates on both a firm commitment and an agency basis. Daiwa may also act as the lead underwriter for a syndicate of securities underwriters.

Certificateholders are entitled to receive monthly, quarterly or semi-annual installments of principal and/or interest, or lease payments due on the receivables, adjusted, in the case of payments of interest, to a specified rate—the pass-through rate—which may be fixed or variable. When payments are made on semi-annual basis, funds are not permitted to be commingled with the assets of the servicer for any period longer than would be permitted for a monthly-pay security. A segregated account is established in the name of the trustee (on behalf of certificateholders) to hold funds received between distribution dates. The account is under the sole control of the trustee, who invests the account's assets in short-term securities which have received a rating comparable to the rating assigned to the certificates. In some cases, the servicer may be permitted to make a single deposit into the account once a month. When the servicer makes such monthly deposits, payments received from obligors by the servicer may be commingled with the servicer's assets during the month prior to deposit. In no event will the period of time between receipt of funds by the servicer and deposit of these funds in a segregated account exceed one month. Furthermore, in those cases where distributions are made semi-annually, the servicer will furnish a report on the operation of the trust to the trustee on a monthly basis. At or about the time the report is delivered to the trustee, it will be made available to certificateholders and delivered to or made available to each rating agency that has rated the certificates.

5. Some of the certificates will be multi-class certificates. Daiwa requests exemptive relief for two types of multi-class certificates: "strip" certificates and "fast-pay/slow-pay" certificates. Strip certificates are a type of security in which the stream of interest payments on receivables is split from the flow of principal payments and separate classes of certificates are established, each representing rights to disproportionate payments of principal and interest.[6]

"Fast-pay/slow-pay" certificates involve the issuance of classes of certificates having different stated maturities or the same maturities with different payment schedules. Interest and/or principal payments received on the underlying receivables are distributed first to the class of certificates having the earliest stated maturity of principal and/or earlier payment schedule, and only when that class of certificates has been paid in full (or has received a specified amount) will distributions be made with respect to the second class of certificates. Distributions on certificates having later stated maturities will proceed in like manner until all certificateholders have been paid in full. The only difference between this multi-class pass-through arrangement and a single-class pass-through arrangement is the order in which distributions are made to certificateholders. In each case, certificateholders will have a beneficial ownership interest in the underlying assets. In neither case will the rights of a plan purchasing certificates be subordinated to the rights of another certificateholder in the event of default on any of the underlying obligations. In particular, if the amount available for distribution to certificateholders is less than the amount required to be so distributed, all senior certificateholders then entitled to receive distributions will share in the amount distributed on a pro rata basis.[7]

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[4] The Department notes that PTE 83-1 [48 FR 895, January 7, 1983], a class exemption for mortgage pool investment trusts, would generally apply to trusts containing single-family residential mortgages, provided that the applicable conditions of PTE 83-1 are met. Daiwa requests relief for single-family residential mortgages in this exemption because it would prefer one exemption for all trusts of similar structure. However, Daiwa has stated that it may still avail itself of the Exemptive relief provided by PTE 83-1.

[5] Guaranteed governmental mortgage pool certificates are mortgage-backed securities with respect to which interest and principal payable is guaranteed by the Government National Mortgage Association (GNMA), the Federal Home Loan Mortgage Corporation (FHLMC), or the Federal National Mortgage Association (FNMA). The Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(i)) provides that where a plan acquires a guaranteed governmental mortgage pool certificate, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate. The applicant is requesting exemptive relief for trusts containing guaranteed governmental mortgage pool certificates because the certificates in the trusts are plan assets.

[6] It is the Department's understanding that where a plan invests in REMIC "residual" interest certificates to which this exemption applies, some of the income received by the plan as a result of such investment may be considered unrelated business taxable income to the plan, which is subject to income tax under the Code. The Department emphasizes that the prudence requirement of section 404(a)(1)(B) of the Act would require plan fiduciaries to carefully consider this and other tax consequences prior to causing plan assets to be invested in certificates pursuant to this exemption.

[7] If a trust issues subordinate certificates, holders of such subordinate certificates may not share in the amount distributed on a pro rata basis. The Department notes that the exemption does not provide relief for plan investment in such subordinated certificates.

6. For tax reasons, the trust must be maintained as an essentially passive entity. Therefore, both the sponsor's discretion and the servicer's discretion with respect to assets included in a trust are severely limited. Pooling and servicing agreements provide for the substitution of receivables by the sponsor only in the event of defects in documentation discovered within a limited time after the issuance of trust certificates. Any receivable so substituted is required to have characteristics substantially similar to the replaced receivable and will be at least as creditworthy as the replaced receivable.

In some cases, the affected receivable would be repurchased with the purchase price applied as a payment on the affected receivable and passed through to certificateholders.

Parties to Transactions

7. The *originator* of a receivable is the entity that initially lends money to a borrower (obligor), such as a homeowner or automobile purchaser, or leases property to the lessee. The originator may either retain a receivable in its portfolio or sell it to a purchaser, such as a trust sponsor.

Originators of receivables included in the trusts will be entities that originate receivables in the ordinary course of their business, including finance companies, for whom such origination constitutes the bulk of their operations, financial institutions for whom such origination constitutes a substantial part of their operations, and any kind of manufacturer, merchant, or service enterprise for whom such origination is an incidental part of its operations. Each trust may contain assets of one or more originators. The originator of the receivables may also function as the trust sponsor or servicer.

8. The *sponsor* will be one of three entities: (i) A special-purpose corporation unaffiliated with the servicer, (ii) a special-purpose or other corporation affiliated with the servicer, or (iii) the servicer itself. Where the sponsor is not also the servicer, the sponsor's role will generally be limited to acquiring the receivables to be included in the trust, establishing the trust, designating the trustee, and assigning the receivables to the trust.

9. The *trustee* of a trust is the legal owner of the obligations in the trust. The trustee is also a party to or beneficiary of all the documents and instruments deposited in the trust, and as such is responsible for enforcing all the rights created thereby in favor of certificateholders.

The trustee will be an independent entity, and therefore will be unrelated to Daiwa, the trust sponsor or the servicer. The pooling and servicing agreement often provides that upon the occurrence of one or more events of default by the servicer, the trustee will succeed to the rights and responsibilities of the servicer. If the trustee is unwilling or unable under applicable law to succeed to the duties and responsibilities of the servicer or if the holders of a specified percentage in aggregate principal amount of certificates so decide, a successor servicer will be appointed instead of the trustee. Daiwa represents that the trustee will be a substantial financial institution or trust company experienced in trust activities. The trustee receives a fee for its services, which will be paid by the sponsor, servicer or out of trust assets. The method of compensating the trustee will be specified in the pooling and servicing agreement and disclosed in the prospectus or private placement memorandum relating to the offering of the certificates.

10. The *servicer* of a trust administers the receivables on behalf of the certificateholders. The servicer's functions typically involve, among other things, notifying borrowers of amounts due on receivables, maintaining records of payments received on receivables and instituting foreclosure or similar proceedings in the event of default. In cases where a pool of receivables has been purchased from a number of different originators and deposited in a trust, it is common for the receivables to be "subserviced" by their respective originators and for a single entity to "master service" pool of receivables on behalf of the owners of the related series of certificates. Where this arrangement is adopted, a receivable continues to be serviced from the perspective of the borrower by the local subservicer, while the investor's perspective is that the entire pool of receivables is serviced by a single, central master servicer who collects payments from the local subservicers and passes them through to certificateholders.

In most cases, the originator and servicer of receivables to be included in a trust and the sponsor of the trust (though they themselves may be related) will be unrelated to Daiwa. In some cases, however, affiliates of Daiwa may originate or service receivables included in a trust, or may sponsor a trust.

Certificate Price, Pass-Through Rates and Fees

11. Where the sponsor of a trust is not the originator of receivables included in a trust, the sponsor generally purchases the receivables in the secondary market, either directly from the originator or from another secondary market participant. The price the sponsor pays for a receivable is determined by competitive market forces, taking into account payment terms, interest rate, quality, and forecasts as to future interest rates.

As compensation for the receivables transferred to the trust, the sponsor receives certificates representing the entire beneficial interest in the trust, or the cash proceeds of the sale of such certificates. In addition, the sponsor may retain an interest in the receivables in the trust consisting of an entitlement to receive a specified portion of principal and/or interest payments from receivables, which interest may later be sold by the sponsor. In some cases, the retained interest is subordinated to the certificates. In addition, in some transactions the originator may sell receivables to the trust for cash. At the time of the sale, the trustee would sell certificates to the public or to underwriters and use the cash proceeds of the sale to pay the originator for the receivables sold to the trust. If the sponsor receives certificates from the trust, the sponsor sells all or a portion of these certificates for cash to investors or securities underwriters. In some transactions, the sponsor or an affiliate may retain a portion of the certificates for its own account. The transfer of the receivables to the trust by the sponsor, the sale of certificates to investors, and the receipt of the cash proceeds by the sponsor generally take place simultaneously.

12. The price of the certificates, both in the initial offering and in the secondary market, is affected by market forces including investor demand, the pass-through interest rate on the certificates in relation to the rate payable on investments of similar types and quality, expectations as to the effect on yield resulting from prepayment of underlying receivables, and expectations as to the likelihood of timely payment.

The pass-through rate for certificate represents that portion of the interest rate on the receivables that will be available for distribution to certificate holders and is equal to the interest rate on receivables included in the trust minus a specified servicing fee.[8] This

[8] The pass-through rate on certificates representing interests in thrusts holding leases is determined by breaking down lease payments into "principal" and "interest" components based on an implicit interest rate.

rate is generally determined by the same market forces that determine the price of a certificate. The price of a certificate and its pass-through, or coupon, rate together determine the yield to investors. If an investor purchases a certificate at less than par, that discount augments the stated pass-through rate; conversely, a certificate purchased at a premium yields less than the stated coupon.

13. As compensation for performing its servicing duties, the servicer (who may also be the sponsor, and receive fees for acting in that capacity) will retain the difference between payments received on the receivables in the trust and payments payable (at the pass-through rate) to certificate holders, except that in some cases a portion of the payments on receivables may be paid to a third party, such as a fee paid to a provider of credit support. The servicer may receive additional compensation by having the use of the amounts paid on the receivables between the time they are received by the servicer and the time they are due to the trust (which time is set forth in the pooling and servicing agreement). The servicer will be required to pay the administrative expenses of servicing the trust, including, in some cases, the trustee's fee, out of its servicing compensation.

The servicer is also compensated to the extent it may provide credit enhancement to the trust or otherwise arrange to obtain credit support from another party. This "credit support fee" may be aggregated with other servicing fees, and is either paid out of the interest income received on the receivables in excess of the pass-through rate or paid in a lump sum at the time the trust is established.

14. The servicer may be entitled to retain certain administrative fees paid by a third party, usually the obligor. These administrative fees fall into three categories: (a) prepayment fees; (b) late payment and payment extension fees; and (c) fees and charges associated with foreclosure or repossession, or other conversion of a secured position into cash proceeds, upon default of an obligation.

Compensation payable to the servicer will be set forth or referred to in the pooling and servicing agreement and described in reasonable detail in the prospectus or private placement memorandum relating to the certificates.

15. Payments on receivables may be made by obligors to the servicer at various times during the period preceding any date on which pass-through payments to the trust are due. In some cases, the pooling and servicing agreement may permit the servicer to place these payments in non-interest bearing accounts in itself or to commingle such payments with its own funds prior to the distribution dates. In these cases, the servicer would be entitled to the benefit derived from the use of the funds between the date of payment on a receivable and the pass-through date. Commingled payments may not be protected from the creditors of the servicer in the event of the servicer's bankruptcy or receivership. In those instances when payments on receivables are held in non-interest bearing accounts or are commingled with the servicer's own funds, the servicer is required to deposit these payments by a date specified in the pooling and servicing agreement into an account from which the trustee makes payments to certificateholders.

16. Daiwa will receive a fee in connection with the securities underwriting or private placement of certificates. In a firm commitment underwriting, this fee would consist of the difference between what Daiwa receives for the certificates that it distributes and what it pays the sponsor for those certificates. Similarly, when Daiwa purchasers certificates as principal in the initial issuance for resale in a private offering, Daiwa will receive the difference between what it receives for the certificates it sells and what it pays the sponsor for those certificates. In a private placement, the fee normally takes the form of an agency commission paid by the sponsor.

Daiwa's arrangements with other underwriters in connection with offerings of certificates are similar to the arrangements that Daiwa has with other underwriters in public offerings generally. Such arrangements with other underwriters are typically set forth in an "agreement among underwriters." The agreement among underwriters gives Daiwa, as lead manager of the offering, the authority to act on behalf of all of the underwriters. Such agreement among underwriters also imposes customary restrictions on the underwriters' dealings in the offered securities as are necessary for the purposes of complying with securities laws and ensuring the orderly distribution of the offered securities, and contains provisions regarding the sharing of expenses and indemnity and contribution.

Purchase of Receivables by the Servicer

17. The applicant represents that as the principal amount of the receivables in a trust is reduced by payment, the cost of administering the trust generally increases, making the servicing of the trust prohibitively expensive at some point. Consequently, the pooling and servicing agreement generally provides that the servicer may purchase the receivables included in the trust when the aggregate unpaid balance payable on the receivables is reduced to a specified percentage (usually between 5 and 10 percent) of the initial aggregate unpaid balance.

The purchase price of a receivable is specified in the pooling and servicing agreement and will be at least equal to the unpaid principal balance on the receivable plus accrued interest, less any unreimbursed advances of principal made by the servicer.

Certificate Ratings

18. The certificates will have received one of the three highest ratings available from either S&P's, Moody's, D&P or Fitch. Insurance or other credit support will be obtained by the trust sponsor to the extent necessary for the certificates to attain the desired rating. The amount of this credit support is set by the rating agencies at a level that is a multiple of the worst historical net credit loss experience for the type of obligations included in the issuing trust.

Provision of Credit Support

19. In some cases, the master servicer, or an affiliate of the master servicer, may provide credit support to the trust (i.e., act as an insurer). Typically, in these cases, the master servicer, in its capacity as servicer, will first advance funds to the full extent that it determines that such advances will be recoverable (a) out of late payments by the obligors, (b) from the credit support provider (which may be itself) or, (c) in the case of a trust that issues subordinated certificates, from amounts otherwise distributable to holders of subordinated certificates, and the master servicer will advance such funds in a timely manner. In some transactions, however, the master servicer may not be obligated to advance funds, but instead would be called upon to provide funds to cover defaulted payments to the full extent of its obligations as insurer. When the servicer is the provider of the credit support and provides its own funds to cover defaulted payments, it will do so either on the initiative of the trustee, or on its own initiative on behalf of the trustee, but in either event it will provide such funds to cover payments to the full extent of its obligations under the credit support mechanism.

If the master servicer fails to advance funds, fails to call upon the credit support mechanism to provide funds to cover defaulted payments, or otherwise

fails in its duties, the trustee would be required and would be able to enforce the certificateholders' rights, as both a party to the pooling and servicing agreement and the owner of the trust estate, including rights under the credit support mechanism. Therefore, the trustee, who is independent of the servicer, will have the ultimate right to enforce the credit support arrangement.

When a master servicer advances funds, the amount so advanced is recoverable by the servicer out of future payments on receivables held by the trust to the extent not covered by credit support. However, where the master servicer provides credit support to the trust, there are protections in place to guard against a delay in calling upon the credit support to take advantage of the fact that the credit support declines proportionally with the decrease in the principal amount of the obligations in the trust as payments on receivables are passed through to investors. These safeguards include:

(a) There is often a disincentive to postponing credit losses because the sooner repossession or foreclosure activities are commenced, the more value that can be realized on the security for the obligation;

(b) The master servicer has servicing guidelines which include a general policy as to the allowable delinquency period after which an obligation ordinarily will be deemed uncollectible. The pooling and servicing agreement will require the master servicer to follow its normal servicing guidelines and will set forth the master servicer's general policy as to the period of time after which delinquent obligations ordinarily will be considered uncollectible;

(c) As frequently as payments are due on the receivables included in the trust (monthly, quarterly or semi-annually, as set forth in the pooling and servicing agreement), the master servicer is required to report to the independent trustee the amount of all past-due payments and the amount of all servicer advances, along with other current information as to collections on the receivables and draws upon the credit support. Further, the master servicer is required to deliver to the trustee annually a certificate of an executive officer of the master servicer stating that a review of the servicing activities has been made under such officer's supervision, and either stating that the master servicer has fulfilled all of its obligations under the pooling and servicing agreement or, if the master servicer has defaulted under any of its obligations, specifying any such default. The master servicer's reports are reviewed at least annually by independent accountants to ensure that the master servicer is following its normal servicing standards and that the master servicer's reports conform to the master servicer's internal accounting records. The results of the independent accountants' review are delivered to the trustee; and

(d) In cases where the master servicer and the insurer are affiliated or are the same entity, the credit support has a "floor" dollar amount that protects investors against the possibility that a large number of credit losses might occur towards the end of the life of the trust, whether due to servicer advances or any other cause. The floor amount may be a fixed dollar amount or a multiple of the balance of one or more of the largest obligations outstanding. Once the floor amount has been reached, the servicer lacks an incentive to postpone the recognition of credit losses because the credit support amount becomes a fixed dollar amount, subject to reduction only for actual draws. From the time that the floor amount is effective until the end of the life of the trust, there are no proportionate reductions in the credit support amount caused by reductions in the pool principal balance. Indeed, where the floor is a fixed dollar amount, the amount of credit support ordinarily increases as a percentage of the pool principal balance during the period that the floor is in effect.

Disclosure

20. In connection with the original issuance of certificates, the prospectus or private placement memorandum will be furnished to investing plans. The prospectus or private placement memorandum will contain information material to a fiduciary's decision to invest in the certificates, including:

(a) Information concerning the payment terms of the certificates, the rating of the certificates, and any material risk factors with respect to the certificates;

(b) A description of the trust as a legal entity and a description of how the trust was formed by the seller/servicer or other sponsor of the transaction;

(c) Identification of the independent trustee for the trust;

(d) A description of the receivables contained in the trust, including the types of receivables, the diversification of the receivables, their principal terms, and their material legal aspects;

(e) A description of the sponsor and servicer;

(f) A description of the pooling and servicing agreement, including a description of the seller's principal representations and warranties as to the trust assets and the trustee's remedy for any breach thereof; a description of the procedures for collection of payments on receivables and for making distributions to investors, and a description of the accounts into which such payments are deposited and from which such distributions are made; identification of the servicing compensation and any fees for credit enhancement that are deducted from payments on receivables before distributions are made to investors; a description of periodic statements provided to the trustee, and provided to or made available to investors by the trustee; and a description of the events that constitute events of default under the pooling and servicing contract and a description of the trustee's and the investors' remedies incident thereto;

(g) A description of the credit support;

(h) A general discussion of the principal federal income tax consequences of the purchase, ownership and disposition of the pass-through securities by a typical investor;

(i) A description of the underwriters' plan for distributing the pass-through securities to investors; and

(j) Information about the scope and nature of the secondary market, if any, for the certificates.

21. Reports indicating the amount of payments of principal and interest are provided to certificateholders at least as frequently as distributions are made to certificateholders. Certificateholders will also be provided with periodic information statements setting forth material information concerning the underlying assets, including, where applicable, information as to the amount and number of delinquent and defaulted loans or receivables.

22. In the case of a trust that offers and sells certificates in a registered public offering, the trustee, the servicer or the sponsor will file such periodic reports as may be required to be filed under the Securities Exchange Act of 1934. Although some trusts that offer certificates in a public offering will file quarterly reports on Form 10-Q and Annual Reports on Form 10-K, many trusts obtain, by application to the Securities and Exchange Commission, a complete exemption from the requirement to file quarterly reports on Form 10-Q and a modification of the disclosure requirements for annual reports on Form 10-K. If such an exemption is obtained, these trusts normally would continue to have the obligation to file current reports on Form 8-K to report material developments concerning the trust and the certificates. While the Securities and Exchange

Commission's interpretation of the periodic reporting requirements is subject to change, periodic reports concerning a trust will be filed to the extent required under the Securities Exchange Act of 1934.

23. At or about the time distributions are made to certificateholders, a report will be delivered to the trustee as to the status of the trust and its assets, including underlying obligations. Such report will typically contain information regarding the trust's assets, payments received or collected by the servicer, the amount of prepayments, delinquencies, servicer advances, defaults and foreclosures, the amount of any payments made pursuant to any credit support, and the amount of compensation payable to the servicer. Such report also will be delivered to or made available to the rating agency or agencies that have rated the trust's certificates.

In addition, promptly after each distribution date, certificateholders will receive a statement prepared by the trustee summarizing information regarding the trust and its assets. Such statement will include information regarding the trust and its assets, including underlying receivables. Such statement will typically contain information regarding payments and prepayments, delinquencies, the remaining amount of the guaranty or other credit support and a breakdown of payments between principal and interest.

Secondary Market Transactions

24. It is Daiwa's normal policy to attempt to make a market for securities for which it is lead or co-managing underwriter, and it is Daiwa's intention to attempt to make a market for any certificates for which Daiwa is lead or co-managing underwriter.

Retroactive Relief

25. Daiwa has requested that the relief proposed herein be made retroactive to January 1, 1991, which is the date upon which Daiwa states that the representations made herein and the conditions of this proposed exemption are satisfied. Daiwa does not believe that it has engaged in any prohibited transactions that would be covered by the requested exemption. However, since January 1, 1991, it is possible that some transactions may have occurred that would be prohibited. For example, because many certificates are held in street or nominee name, it is not always possible to identify whether the percentage interest of plans in a trust is or is not "significant" for purposes of the Department's regulation relating to the definition of plan assets (29 CFR 2510.3-101(f)). These problems are compounded as transactions occur in the secondary market. In addition, with respect to the "publicly-offered security" exception contained in that regulation (29 CFR 2510.3-101(b)), it is difficult to determine whether each purchaser of a certificate is independent of all other purchasers.

Summary

26. In summary, the applicant represents that the transactions for which exemptive relief is requested satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The trusts contain "fixed pools" of assets. There is little discretion on the part of the trust sponsor to substitute receivables contained in the trust once the trust has been formed;

(b) Certificates in which plans invest will have been rated in one of the three highest rating categories by S&P's, Moody's, D&P or Fitch. Credit support will be obtained to the extent necessary to attain the desired rating;

(c) All transactions for which Daiwa seeks exemptive relief will be governed by the pooling and servicing agreement, which is made available to plan fiduciaries for their review prior to the plan's investment in certificates;

(d) Exemptive relief from sections 406(b) and 407 for sales to plans is substantially limited; and

(e) Daiwa has made, and anticipates that it will continue to make, a secondary market in certificates.

Discussion of Proposed Exemption

I. Differences between Proposed Exemption and Class Exemption PTE 83-1

The exemptive relief proposed herein is similar to that provided in PTE 81-7 [46 FR 7520, January 23, 1981], Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, amended and restated as PTE 83-1 [48 FR 895, January 7, 1983].

PTE 83-1 applies to mortgage pool investment trusts consisting of interest-bearing obligations secured by first or second mortgages or deeds of trust on single-family residential property. The exemption provides relief from sections 406(a) and 407 for the sale, exchange or transfer in the initial issuance of mortgage pool certificates between the trust sponsor and a plan, when the sponsor, trustee or insurer of the trust is a party-in-interest with respect to the plan, and the continued holding of such certificates, provided that the conditions set forth in the exemption are met. PTE 83-1 also provides exemptive relief from section 406(b)(1) and (b)(2) of the Act for the above-described transactions when the sponsor, trustee or insurer of the trust is a fiduciary with respect to the plan assets invested in such certificates, provided that additional conditions set forth in the exemption are met. In particular, section 406(b) relief is conditioned upon the approval of the transaction by an independent fiduciary. Moreover, the total value of certificates purchased by a plan must not exceed 25 percent of the amount of the issue, and at least 50 percent of the aggregate amount of the issue must be acquired by persons independent of the trust sponsor, trustee or insurer. Finally, PTE 83-1 provides conditional exemptive relief from section 406(a) and (b) of the Act for transactions in connection with the servicing and operation of the mortgage trust.

Under PTE 83-1, exemptive relief for the above transactions is conditioned upon the sponsor and the trustee of the mortgage trust maintaining a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all trust mortgages or the principal balance of the largest mortgage.

The exemptive relief proposed herein differs from that provided by PTE 83-1 in the following major respects: (1) The proposed exemption provides individual exemptive relief rather than class relief; (2) The proposed exemption covers transactions involving trusts containing a broader range of assets than single-family residential mortgages; (3) Instead of requiring a system for insuring the pooled receivables, the proposed exemption conditions relief upon the certificates having received one of the three highest ratings available from S&P's, Moody's, D&P or Fitch (insurance or other credit support would be obtained only to the extent necessary for the certificates to attain the desired rating); and (4) The proposed exemption provides more limited section 406(b) and section 407 relief for sales transactions.

II. Ratings of Certificates

After consideration of the representations of the applicant and information provided by S&P's, Moody's, D&P and Fitch, the Department has decided to condition exemptive relief upon the certificates having attained a rating in one of the three highest generic

rating categories from S&P's, Moody's, D&P or Fitch. The Department believes that the rating condition will permit the applicant flexibility in structuring trusts containing a variety of mortgages and other receivables while ensuring that the interests of plans investing in certificates are protected. The Department also believes that the ratings are indicative of the relative safety of investments in trusts containing secured receivables. The Department is conditioning the proposed exemptive relief upon each particular type of asset-backed security having been rated in one of the three highest rating categories for at last one year and having been sold to investors other than plans for at last one year.[9]

III Limited Section 406(b) and Section 407(a) Relief for Sales

Daiwa represents that in some cases a trust sponsor, trustee, servicer, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates may be a pre-existing party in interest with respect to an investing plan.[10] In these cases, a direct or indirect sale of certificates by that party in interest to the plan would be a prohibited sale or exchange of property under section 406(a)(1)(A) of the Act.[11] Likewise, issues are raised under section 406(a)(1)(D) of the Act where a plan fiduciary causes a plan to purchase certificates where trust funds will be used to benefit a party in interest.

Additionally, Daiwa represents that a trust sponsor, servicer, trustee, insurer, and obligor with respect to receivables contained in a trust, or an underwriter of certificates representing an interest in a trust may be a fiduciary with respect to an investing plan. Daiwa represents that the exercise of fiduciary authority by any of these parties to cause the plan to invest in certificates representing an interest in the trust would violate section 406(b)(1), and in some cases section 406(b)(2), of the Act.

Moreover, Daiwa represents that to the extent there is a plan asset "look through" to the underlying assets of a trust, the investment in certificates by a plan covering employees of an obligor under receivables contained in a trust may be prohibited by sections 406(a) and 407(a) of the Act.

After consideration of the issues involved, the Department has determined to provide the limited sections 406(b) and 407(a) relief as specified in the proposed exemption.

FOR FURTHER INFORMATION CONTACT: Mr. Ronald Willett of the Department, telephone (202) 523-8881. (This is not a toll-free number.)

USPCI, Inc. Savings Plan (the Plan) Located in Houston, Texas

[Application No. D-8671]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale by the Plan of certain real estate limited partnership interests (the Interests) to USPCI, Inc. (the Employer), the sponsor of the Plan, provided that the price for each of the Interests is the greater of either (i) the original purchase price for each of the Interests, plus additional contributions or expenses relating to the holding of the Interests, or (ii) the fair market value of each of the Interests on the date of sale.

Summary of Facts and Representations

1. The Plan is a profit sharing plan which, as of December 31, 1990, had 1,435 participants and total assets of $4.4 million. The trustees of the Plan and the decision-makers for the assets of the Plan involved in the proposed transaction are Jack L. Messman, James H. Campbell, and Kenneth Jackson (together, the Trustees).

2. The Employer is a Delaware corporation engaged in the business of pollution control for oil and gas companies. The Employer has its principal place of business at 515 West Greens Road in Houston, Texas.

Prior to January 1, 1987, the Employer participated in a profit sharing plan maintained by the Beard Company (the Beard Plan). Effective January 1, 1987, the Employer established the Plan. The Employer states that all assets and liabilities of the Beard Plan attributable to participants who were employed by the Employer were transferred to the Plan. The assets transferred from the Beard Plan to the Plan included the Interests.

3. The Interests are described as follows: (1) a 1.088479% interest in the D/FW North Limited Partnership, an unrelated party, which owns a 23.7 acre parcel of unimproved real property in Tarrant County, Texas; (2) a 2.176958% interest in the D/FW SH-121 Limited Partnership, an unrelated party, which owns a 8.458 acre parcel of unimproved real property in Dallas County, Texas; (3) a 0.914714% interest in the FM 1314—Needham Road Limited Partnership, an unrelated party, which owns a 933 acre parcel of unimproved real property in Montgomery County, Texas; (4) a 2.176958% interest in the Eastex Freeway—IAH Limited Partnership, an unrelated party, which owns a 71.54 acre parcel of unimproved real property in Harris County, Texas; and (5) a 0.936% undivided interest in the Market Place Grantor Trust, which owns a 9.5 acre parcel of improved real property located at SE 33rd Street in Edmond, Oklahoma.

4. The Beard Plan acquired the Interest in the D/FW North Limited Partnership (the D/FW North Interest) on four different dates between December 1, 1983 and November 7, 1986 for a total of $21,388.61. The Beard Plan and the Plan made additional capital contributions and incurred expenses totalling approximately $13,527, making the total cost incurred for the D/FW North Interest approximately $34,915, as of December 31, 1990.

The D/FW North Interest was appraised by W.L. Don Moore, Jr., NIREA (Mr. Don Moore), an independent, qualified real estate appraiser in Dallas, Texas, as having a fair market value of $25,742, as of December 31, 1990.

5. The Beard Plan acquired the Interest in the D/FW SH-121 Limited Partnership (the D/FW SH-121 Interest) on four different dates between February 28, 1984 and March 26, 1987 for a total of $16,784.35. The Beard Plan and

[9] In referring to different "types" of asset-backed securities, the Department means certificates representing interests in trusts containing different "types" of receivables, such as single family residential mortgages, multi-family residential mortgages, commercial mortgages, home equity loans, auto loan receivables, installment obligations for consumer durables secured by purchase money security interests, etc. The Department intends this condition to require that certificates in which a plan invests are of the type that have been rated (in one of the three highest generic rating categories by S&P's, D&P, Fitch or Moody's) and purchased by investors other than plans for at least one year prior to the plan's investment pursuant to the proposed exemption. In this regard, the Department does not intend to require that the particular assets contained in a trust must have been "seasoned" (e.g., originated at least one year prior to the plan's investment in the trust).

[10] In this regard, we note that the exemptive relief proposed herein is limited to certificates with respect to which Daiwa or any of its affiliates is either (a) the sole underwriter or manager or comanager of the underwriting syndicate, or (b) a selling or placement agent.

[11] The applicant represents that where a trust sponsor is an affiliate of Daiwa, sales to plans by the sponsor may be exempt under PTE 75-1, Part II (relating to purchases and sales of securities by broker-dealers and their affiliates), if Daiwa is not a fiduciary with respect to plan assets to be invested in certificates.

the Plan made additional capital contributions and incurred expenses totalling approximately $16,286, making the total cost incurred for the D/FW SH–121 Interest approximately $32,070, as of December 31, 1990.

The D/FW SH–121 Interest was appraised by Mr. Don Moore as having a fair market value of $23,511, as of December 31, 1990.

6. The Beard Plan acquired the Interest in the FM 1314—Needham Road Limited Partnership (the Needham Road Interest) on three different dates between April 2, 1986 and December 30, 1986 for a total of $9,793.81. The Beard Plan and the Plan made additional capital contributions and incurred expenses totalling approximately $9,481, making the total cost incurred for the Needham Road Interest approximately $19,274, as of December 31, 1990.

The Needham Road Interest was appraised by Ray C. Coleman, Jr., MAI (Mr. Coleman), an independent, qualified real estate appraiser in Spring, Texas, as having a fair market value of $8,800, as of December 31, 1990.

7. The Beard Plan acquired the Interest in the Eastex Freeway—IAH Limited Partnership (the Eastex Freeway Interest) on four different dates between May 10, 1985 and March 26, 1987 for a total of $13,154.27. The Beard Plan and the Plan made additional capital contributions and incurred expenses totalling approximately $19,611, making the total cost incurred for the Eastex Freeway Interest approximately $32,765, as of December 31, 1990.

The Eastex Freeway Interest was appraised by Mr. Coleman as having a fair market value of $23,700, as of December 31, 1990.

8. The Beard Plan acquired the Interest in the Market Place Grant Trust (the Market Place Interest) on February 1, 1981 for $33,686. Neither the Beard Plan nor the Plan made any additional capital contributions or incurred any additional expenses for the Market Place Interest. Therefore, the total cost incurred for the Market Place Interest was $33,686, as of December 31, 1990.

The Market Place Interest was appraised by Patrick Glenn, MAI (Mr. Glenn), an independent, qualified appraiser in Oklahoma City, Oklahoma, as having a fair market value of $25,272, as of December 31, 1990.

9. All of the Interests were acquired by the Beard Plan directly from the issuers of such interests (i.e. the limited partnerships or trust) which were unrelated third parties.[12] The applicant represents that with the exception of the Market Place Interest, the assets of the Plan are considered to consist solely of the Interests held by the Plan and are not considered to extend to any interest in the underlying properties held by the various limited partnerships. However, with respect to the Market Place Interest, the Plan's interest includes an undivided interest in the underlying assets of the Market Place Grantor Trust (the Grantor Trust).[13] In this regard, the applicant states that: (i) The Plan's interest in an equity interest in an entity which is not an operating company, as defined under the Department's "plan asset" regulation (see 29 CFR § 2510.3–101); (ii) benefit plan investors, including the Plan, collectively own interests which are significant (i.e., exceed 25% of all outstanding interests in the Grantor Trust), as defined by such regulation; and (iii) none of the various exceptions discussed in the "plan asset" regulation apply for the assets held by the Grantor Trust).[14]

With respect to the "plan assets" held by the Grantor Trust, the applicant states that the Grantor Trust originally purchased an undeveloped tract of land (the Property) on January 1, 1981 from Market Place Limited (the Partnership), an unrelated party, for approximately $3.5 million and simultaneously entered into a ground lease (the Lease) back to the Partnership for a non-renewable term of 50 years. The Partnership subsequently constructed a retail shopping center on the Property (the Market Place Shopping Center). The general partner of the Partnership is F.C. Associates, an unrelated party. The Grantor Trust provided the Partnership with a construction loan which was secured by a mortgage (the Mortgage) on the Market Place Shopping Center. The Grantor Trust continues to own the Property and the partnership continues to own the Market Place Shopping Center, subject to the Mortgage. The applicant represents that the terms of the Lease and the Mortgage are no less favorable to the Grantor Trust than such terms are in similar transactions. No fees are charged to any employee benefit plans, including the Plan, for the operation of the Grantor Trust. The decision-makers for the "plan assets" held by the Grantor Trust are the trustees of other appropriate plan fiduciaries for each of the employee benefit plans which have invested in the Grantor Trust.[15]

10. The applicant requests an exemption to permit the sale of the Interests by the Plan to the Employer at a price which is the greater of either the original purchase price for each of the Interests, plus all additional expenditures relating to the holding of the Interests, or the fair market value of each of the Interests on the date of the sale. The sale of the Interests will be a one-time transaction for cash and the Plan will not pay any commissions or other expenses in connection with the transaction. All appraisals of the Interests will be updated prior to the transaction.

The applicant represents that the Interests are no longer suitable Plan investments because they have declined in value and the Plan must make additional capital contributions annually to most of the limited partnerships to defray their expenses. In addition, effective January 1, 1991, the Plan permits participants to exercise investment discretion over amounts credited to their accounts in the Plan. The Interests are fairly illiquid assets which preclude the participants from exercising complete investment discretion for the assets in their accounts which are attributable to the Interests. The proposed transaction will allow the Plan to sell the Interests and reinvest the sale proceeds in other investments.

11. The Trustees have appointed Liberty National Bank and Trust Company of Oklahoma City (the Bank) to act as an independent fiduciary for the Plan in connection with the proposed sale of the D/FW North Interest, the D/FW SH–121 Interest, the Needham Road Interest, and the Eastex Freeway Interest.[16] The Bank is

[12] The Department is expressing no opinion as to whether the acquisition and holding of the Interests violated any provision of Part 4 of the Title I of the Act.

[13] The Department is not expressing any opinion in this proposed exemption regarding whether the underlying assets held by the limited partnerships or the Grantor Trust are "plan assets" subject to the Act.

[14] See 29 CFR 2510.3–101(e).

[15] The Department is expressing no opinion in this proposed exemption regarding whether the use of "plan assets" held by the Grantor Trust violated any fiduciary responsibility provisions of the Act. In this regard, section 404(a)(1) of the Act requires, among other things, that a fiduciary of a plan act prudently, solely in the interest of the plan's participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries when making investment decisions on behalf of a plan.

[16] The applicant states that the Bank will not be the Plan's independent fiduciary for the proposed sale of the Market Place Interest because the Bank is currently the trustee of the Grantor Trust, which holds "plan assets" of other employee benefit plans. In this regard, the Bank believes that its relationship to the Grantor Trust may conflict with the duties of an "independent fiduciary" for the Plan in a transaction involving the Market Place Interest.

unrelated to the Employer and its affiliates and currently acts as the custodian for the assets of the Plan involved in the proposed transaction. The Bank represents that it is a qualified fiduciary which is experienced in managing assets of employee benefit plans. The Bank acknowledges its duties, responsibilities and liabilities in acting as a fiduciary for the Plan under the Act.

The Bank states that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries. The Bank will monitor the sale of each of the Interests by the Plan to the Employer to ensure that the Plan receives the greater of either the total costs incurred for the acquisition and holding of such Interests of the fair market value of such Interests on the date of the sale. In determining the fair market value of each Interest, the Bank will review updated appraisals of the Interests by the independent appraisers (i.e. Mr. Don Moore and Mr. Coleman) prior to the proposed transaction.

12. The Trustees have appointed Alvan E. Porter (Mr. Porter) of the Porter Investment Company (the Company) in Oklahoma City, Oklahoma to act as an independent fiduciary for the Plan in connection with the proposed sale of the Market Place Interest to the Employer. Mr. Porter represents that he is not related to the Employer or its affiliates and is qualified to act as an independent fiduciary for the Plan as a result of his extensive experience in banking and commercial real estate in Dallas, Texas and Oklahoma City, Oklahoma. In this regard, Mr. Porter states that he was a senior officer with the Republic National Bank of Dallas and the First National Bank of Oklahoma City prior to establishing the Company. The Company is an investment management firm involved with commercial real estate development and acts as a consultant for real estate investors, including employee benefit plans. Mr. Porter acknowledges his duties, responsibilities, and liabilities in acting as a fiduciary for the Plan under the Act.

Mr. Porter states that the proposed transaction is in the best interests of the Plan and its participants and beneficiaries. Mr. Porter will monitor the sale of the Market Place Interest to the Employer to ensure that the Plan receives the greater of either the total costs incurred for the Market Place Interest held by the Plan or the fair market value of such Interest on the date of the sale. In determining the fair market value of the Market Place Interest, Mr. Porter will review an updated appraisal of such Interest as well as the Market Place Shopping Center by the independent appraiser (i.e., Mr. Glenn) prior to the transaction.

13. In summary, the applicant represents that the proposed transaction will satisfy the statutory criteria of section 408(a) of the Act and section 4975(c)(2) of the Code because: (a) The sale of the Interests will be a one-time transaction for cash; (b) the Plan will receive an amount which will be the greater of either the total costs incurred for the acquisition and holding of the Interests or the fair market value of the Interests on the date of the sale; (c) the Plan will not pay any commissions or other expenses with respect to the sale; (d) independent fiduciaries (i.e. the Bank and Mr. Porter) will be acting for the Plan in connection with the transaction and will monitor the transaction to ensure that the Plan's best interests are protected; and (e) the transaction will allow the Plan to divest itself of the Interests and reinvest the sale proceeds in other investments.

Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliates thereof) results in the plan either paying less than or receiving more than fair market value such excess may be considered a contribution by the sponsoring employer to the plan, and therefore must be examined under the applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION: Mr. E.F. Williams of the Department at (202) 523-8883. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

1. The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1) (b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC this 9th day of August, 1991.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 91-19383 Filed 8-14-91; 8:45 am]

BILLING CODE 4510-29-M

[Prohibited Transaction Exemption 91-44; Exemption Application No. D-8511, et al.]

Grant of Individual Exemptions; Phoenix Mutual Life Insurance Co., et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts

and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Phoenix Mutual Life Insurance Company (Phoenix Mutual) Located in Hartford, Connecticut

[Prohibited Transaction Exemption 91-44; Exemption Application D-8511]

Exemption

The restrictions of sections 406(a) and 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the cash sale (the Sale) on September 28, 1990, of four parcels of real property by the pooled Real Estate Separate Account (RESA) to the general account of Phoenix Mutual; provided that the terms and conditions of the Sale were at least as favorable to RESA as those obtainable in an arm's-length transaction with an unrelated party.

EFFECTIVE DATE: This exemption is effective September 28, 1990.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 18, 1991 at 56 FR 27979.

FOR FURTHER INFORMATION CONTACT: Ms. Kay Madsen of the Department, telephone (202) 523-8971. (This is not a toll-free number.)

State Auto Insurance Companies Employees Retirement Plan (the Plan) Located in Columbus, Ohio

[Prohibited Transaction Exemption 91-45; Exemption Application No. D-8559]

Exemption

The restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed loan by the Plan of $10 million to the State Automobile Mutual Insurance Company (the Employer), the sponsor of the Plan and as such a party in interest with respect to the Plan, provided that the terms of the transaction are at least as favorable to the Plan as an arm's-length transaction with an unrelated party.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the noise of proposed exemption published on June 18, 1991 at 56 FR 27981.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department at (202) 523-8883. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 9th day of August, 1991.

Ivan Strasfeld,

Director of Exemption Determinations, Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 91-19382 Filed 8-14-91; 8:45 am]

BILLING CODE 4510-29-M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts

Music Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Festivals Section) to the National Council on the Arts will be held on September 4-5, 1991 from 9 a.m.-5:30 p.m. and September 6 from 9 a.m.-5 p.m. in room 730 at the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

A portion of this meeting will be open to the public on September 6 from 4 p.m.-5 p.m. The topics will be guidelines review and policy discussion.

The remaining portions of this meeting on September 4-5 from 9 a.m.-5:30 p.m. and September 6 from 9 a.m.-4 p.m. are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of June 5, 1991, these sessions will be closed to the public pursuant to subsection (c)(4), and (6) and (9)(B) of section 552b of the Title 5, United States Code.

Any interested persons may attend, as observers, meetings, or portions thereof,

of advisory panels which are open to the public.

Members of the public attending an open session of a meeting will be permitted to participate in the panel's discussions at the discretion of the chairman of the panel if the chairman is a full-time Federal employee. If the chairman is not a full-time Federal employee, then public participation will be permitted at the chairman's discretion with the approval of the full-time Federal employee in attendance at the meeting, in compliance with this guidance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, 202/682-5532, TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne M. Sabine, Advisory Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call (202) 682-5433.

Dated: August 8, 1991.

Yvonne M. Sabine

Director, Council and Panel Operations, National Endowment for the Arts.

[FR Doc. 91-19459 Filed 8-14-91; 8:45 am]

BILLING CODE 7537-01-M

NATIONAL SCIENCE FOUNDATION

Collection of Information Submitted for OMB Review

In accordance with the Paperwork Reduction Act and OMB Guidelines, the National Science Foundation is posting a notice of information collection that will affect the public. Interested persons are invited to submit comments by September 9, 1991. Comments may be submitted to:

(A) Agency Clearance Officer. Herman G. Fleming, Division of Personnel and Management, National Science Foundation, Washington, DC 20550, or by telephone (202) 357-7335. and to:

(B) OMB Desk Officer. Office of Information and Regulatory Affairs, ATTN: Dan Chenok, Desk Officer, OMB, 722 Jackson Place, room 3208, NEOB, Washington, DC 20503.

Title: Survey of Industrial Research and Development, 1991, 1992, 1993.

Affected Public: Businesses of other for-profit.

Responses/Burden Hours: 17,300 respondents; 6 hours per response.

Abstract: This survey ascertains the amount and direction of R&D expenditures by U.S. Industry. Government agencies, corporations, research organizations, etc., use the data to analyze and forecast technological growth, investigate productivity determinants, formulate tax policy, and compare individual company performance with industry averages. All manufacturing companies with 500 or more employees, samples of companies in selected non-manufacturing industries, and a sample of small companies are included.

Dated: August 9, 1991.

Herman G. Fleming,

NFS Reports Clearance Officer.

[FR Doc. 91-19386 Filed 8-14-91; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-220]

Niagara Mohawk Power Corp.; Issuance of Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-63, issued to Niagara Mohawk Power Corporation (the licensee), for operation for the Nine Mile Point Nuclear Station Unit No. 1, located in Oswego County, New York.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would consist of a change to the Nine Mile Point Nuclear Station Unit No. 1 Facility Operating License No. DPR-63, and is in response to the licensee's application dated July 27, 1988, as supplemented May 21, 1991. The change would extend the expiration date of the operating license from April 11, 2005, which represents 40 years from the date of the construction permit, to August 22, 2009, which represents 40 years from the date of issuance of Provisional Operating License No. DPR-17, which was superseded in its entirety by full-term Facility Operating License No. DPR-63 issued on December 26, 1974. The Commission's staff has prepared an Environmental Assessment of the proposed action, "Environmental Assessment by the Office of Nuclear Reactor Regulation Relating to the Change in the Expiration Date of Facility Operating License No. DPR-63, Niagara Mohawk Power Corporation, Oswego County, New York, Nine Mile Point Nuclear Station Unit No. 1, Docket Number 50-220, Dated August 7, 1991."

Summary of Environmental Assessment

The Commission's staff has reviewed the potential environmental impact of the proposed change in the expiration date of the operating license for Nine Mile Point Nuclear Station Unit No. 1. This evaluation considered the previous environmental studies, including the "Final Environmental Statement Related to Operation of Nine Mile Point Nuclear Station Unit 1," dated January 21, 1974, and more recent NRC policy related to evaluations of license extensions for similar nuclear power plants.

Radiological Impacts

The staff concludes that for the additional proposed period of operation, population estimates do not indicate that an increased incremental dose to the general public would result due to population changes in the vicinity of the plant. The slow, small increase in the number of people living within the 10-mile zone and the continuing rural nature of the area indicate that the number of people living around the plant should pose no problem to the proposed extension of the operating license. Doses to the general public would continue to remain well within the estimates based on the predictions contained in the Final Environmental Statement (FES).

The additional period of plant operation would not significantly affect the probability or consequences of any reactor accident. Station radiological effluents to unrestricted areas during normal operation have been well within Commission regulations regarding as-low-as-reasonably-achievable (ALARA) limits, and are indicative of future releases. The proposed additional years of reactor operation do not increase the annual public risk from reactor operation.

With regard to normal plant operation, the occupational exposures for the Nine Mile Point Nuclear Station Unit No. 1 personnel averaged over the past 8 years have been lower than the industry average for operating boiling water reactors in the United States for the same time period. The licensee is striving for further dose reductions in accordance with ALARA principles and the staff expects that further reductions will be achieved using advanced technologies and equipment that are and will likely become available.

Accordingly, annual radiological impacts on man, both offsite and onsite, are less than previously estimated in the FES, and our previous cost-benefit conclusions remain valid.

The environmental impacts attributable to transportation of fuel and waste to and from Nine Mile Point Nuclear Station Unit No. 1, with respect to normal conditions of transport and possible accidents in transport, would be bounded as set forth in summary table S-4 of 10 CFR 51.52. The values in table S-4 would continue to represent the contribution of transportation to the environmental costs associated with plant operation.

Nonradiological Impacts

The Commission has concluded that the proposed extension will not cause a significant increase in the impacts to the environment and will not change any conclusions reached by the Commission in the FES.

Finding of No Significant Impact

The Commission has reviewed the proposed change to the expiration date of Nine Mile Point Nuclear Station Unit No. 1 operating license relative to the requirements set forth in 10 CFR part 51. Based upon the environmental assessment, the staff has concluded that there are no significant radiological or non-radiological impacts associated with the proposed action and that the proposed license amendment will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed amendment.

For further details with respect to this action, see (1) the application for amendment dated July 27, 1988, as supplemented May 21, 1991, (2) the Final Environmental Statement Related to Operation of Nine Mile Point Nuclear Station Unit 1, issued January 21, 1974, and (3) the Environmental Assessment dated August 7, 1991. These documents are available for public inspection at the Commission's Public Document room 2120 L Street NW., Washington, DC, and at the State University of New York, Penfield Library, Reference and Documents Department, Oswego, New York 13126.

Dated at Rockville, Maryland, this 7th day of August.

For the Nuclear Regulation Commission.

Robert A. Capra,

Director, Project Directorate I-1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 91-19489 Filed 8-14-91; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF MANAGEMENT AND BUDGET

Cumulative Report on Rescissions and Deferrals

August 1, 1991.

This report is submitted in fulfillment of the requirement of section 1014(e) of the Congressional Budget and Impoundment Control Act of 1974 (Pub. L. 93-344). Section 1014(e) requires a monthly report listing all budget authority for this fiscal year for which, as of the first day of the month, a special message has been transmitted to Congress.

This report gives the status, as of August 1, 1991, of 30 rescission proposals and ten deferrals contained in six special messages for FY 1991. These messages were transmitted to Congress on October 4, 1990, January 9, 1991, February 28, 1991, April 16, 1991, June 28, 1991, and July 24, 1991.

Rescissions (Table A and Attachment A)

As of August 1, 1991, 30 rescissions have been proposed totaling $4,859.3 million. Of the total amount proposed for rescission, $4,312.3 million was previously withheld but has been released, and $542.0 million, which has been pending before the Congress for less than 45 days, has not been withheld. A rescission proposal of $5.0 million is currently being withheld.

Deferrals (Table B and Attachment B)

As of August 1, 1991, $3,749.3 million in budget authority was being deferred from obligation. Attachment B shows the history and status of each deferral reported during FY 1991.

Information From Special Messages

The special messages containing information on rescissions and deferrals that are covered by this cumulative report are printed in the **Federal Register** cited below:

55 FR 41438, Thursday, October 11, 1990
56 FR 1704, Wednesday, January 16, 1991
56 FR 10082, Friday, March 8, 1991
56 FR 18644, Tuesday, April 23, 1991
56 FR 31516, Wednesday, July 10, 1991
56 FR 36716, Wednesday, July 31, 1991

Richard Darman,

Director.

Table A—*Status of FY 1991 Rescission Proposals*

[In millions of dollars]

	Amounts
Rescissions proposed by the President	4,859.3
Rescission proposals rejected by the Congress	
Rescission proposals for which funding was previously withheld and has been released	−4,312.3
Rescission proposals for which funding is not being withheld	−542.0
Rescission proposals for which funding is currently being withheld	5.0

Table B—*Status of FY 1991 Deferrals*

[In millions of dollars]

	Amounts
Deferrals proposed by the President	10,260.8
Routine Executive releases through August 1, 1991 (OMB/Agency releases of $6,558.1 million, partly offset by cumulative positive adjustment of $46.6 million)	−6,511.5
Overturned by the Congress	
Currently before the Congress	3,749.3

Attachments.

ATTACHMENT A—STATUS OF FY 1991 RESCISSION PROPOSALS

[Amounts in thousands of dollars]

As of August 1, 1991, Agency/Bureau/Account	Rescission No.	Amounts pending before Congress: Less than 45 days	Amounts pending before Congress: More than 45 days	Date of message	Amount rescinded	Amount previously withheld and made available	Date made available	Congressional action
Department of Agriculture								
Soil Conservation Service, Watershed and flood prevention operations.	R91-1		10,000	02-28-91		10,000	05-07-91	

ATTACHMENT A—STATUS OF FY 1991 RESCISSION PROPOSALS—Continued

[Amounts in thousands of dollars]

As of August 1, 1991, Agency/Bureau/Account	Rescission No.	Amounts pending before Congress		Date of message	Amount rescinded	Amount previously withheld and made available	Date made available	Congressional action
		Less than 45 days	More than 45 days					
Department of Commerce								
Economic Development Administration, Economic development assistance programs.	R91-28	[1] 115,000		06-28-91				
Department of Defense								
Procurement:								
Procurement of weapons and tracked combat vehicles, Army.	R91-2		86,000	02-28-91		86,000	05-13-91	
Procurement of ammunition, Army	R91-3		13,000	02-28-91		13,000	05-13-91	
Aircraft procurement, Navy	R91-4		1,093,500	02-28-91		1,093,500	05-13-91	
Weapons procurement, Navy	R91-5		2,600	02-28-91		2,600	05-13-91	
Shipbuilding and conversion, Navy	R91-6		405,000	02-28-91		405,000	05-13-91	
Other procurement, Navy	R91-7		10,000	02-28-91		10,000	05-13-91	
Procurement, Marine Corps	R91-8		2,000	02-28-91		2,000	05-13-91	
Aircraft procurement, Air Force	R91-9		14,200	02-28-91		14,200	05-13-91	
Missile procurement, Air Force	R91-10		74,700	02-28-91		74,700	05-13-91	
Other procurement, Air Force	R91-11		254,200	02-28-91		254,200	05-13-91	
Procurement, Defense Agencies	R91-12		65,303	02-28-91		65,303	05-13-91	
National guard and reserve equipment	R91-13		289,900	02-28-91		289,200	05-13-91	
Research, Development, Test, and Evaluation:								
Research, development, test, and evaluation, Army	R91-14		60,800	02-28-91		60,800	05-13-91	
Research, development, test, and evaluation, Navy	R91-15		834,500	02-28-91		834,500	05-13-91	
Research, development, test, and evaluation, Air Force.	R91-16		134,100	02-28-91		134,100	05-13-91	
Research, development, test, and evaluation, Defense Agencies.	R91-17		29,300	02-28-91		29,300	05-13-91	
	R91-30	[2] 5,000		07-24-91				
Military Construction:								
Military construction, Navy	R91-18		48,962	02-28-91		48,962	05-13-91	
Military construction, Air Force	R91-19		91,800	02-28-91		91,800	05-13-91	
Department of Health and Human Services								
Family Support Administration, Interim assistance to States for legalization.	R91-27		2,400	04-16-91		2,400	05-13-91	
Department of Housing and Urban Development								
Housing Programs:								
Annual contributions for assisted housing	R91-20		500,000	02-28-91		500,000	04-08-91	
	R91-29	[1] 427,000		06-28-91				
Congregate services program	R91-21		9,500	02-28-91		9,500	04-09-91	
Nehemiah housing opportunity fund	R91-22		39,112	02-28-91		39,112	04-09-91	
Community Planning and Development Urban development action grants.	R91-23		13,518	02-28-91		13,518	04-09-91	
Rental rehabilitation grants	R91-24		70,000	02-28-91		70,000	04-09-91	
Urban homesteading	R91-25		13,397	02-28-91		13,397	04-09-91	
Rehabilitation loan fund	R91-26		144,459	02-28-91		144,459	04-08-91	
Total, Rescissions Proposed		547,000	4,312,251			4,312,251		

[1] Funding is not being withheld.
[2] Funding is currently being withheld.

ATTACHMENT B—STATUS OF FY 1991 DEFERRALS—AS OF AUGUST 1, 1991

[Amounts in thousands of dollars]

Agency/Bureau/Account	Deferral No.	Amounts Transmitted		Date of message	Releases (−)		Congressional action	Cumulative adjustments (+)	Amount deferred as of 8-1-91
		Original request	Subsequent change (+)		Cumulative OMB/Agency	Congressionally required			
Funds Appropriated to the President									
International Security Assistance									
Economic support fund	D91-1	149,319		10-04-90					
	D91-1A		1,943,510	01-09-91					
	D91-1B		830	02-28-91					
	D91-1C		850,000	06-28-91	2,400,363			45,900	589,196
Foreign military financing	D91-8	4,820,649		01-09-91	4,090,224				730,426
Peacekeeping operations	D91-9	5,177		01-09-91	5,177				0
Department of Agriculture									
Forest Service:									
Expenses, brush disposal	D91-2	135,955		10-04-90					135,955
Cooperative work	D91-3	273,468		10-04-90					

ATTACHMENT B—STATUS OF FY 1991 DEFERRALS—AS OF AUGUST 1, 1991—Continued

[Amounts in thousands of dollars]

Agency/Bureau/Account	Deferral No.	Amounts Transmitted		Date of message	Releases (−)		Congressional action	Cumulative adjustments (+)	Amount deferred as of 8-1-91
		Original request	Subsequent change (+)		Cumulative OMB/Agency	Congressionally required			
	D91-3A		235,572	01-09-91					509,040
Timber salvage sales	D91-10	103,684		02-26-91					103,684
Department of Defense—Civil									
Wildlife Conservation, Military Reservations: Wildlife conservation, Defense	D91-4	1,186		10-04-90					1,186
Department of Health and Human Services									
Social Security Administration: Limitation on administrative expenses (construction).	D91-5	7,127		10-04-90					
	D91-5A		190	06-28-91					7,317
Department of State									
Bureau for Refugee Programs: United States emergency refugee and migration assistance fund, executive.	D91-6	14,529		10-04-90					
	D91-6A		44,507	01-09-91					
	D91-6B		68,000		62,348			665	65,353
Department of Transportation									
Federal Aviation Administration: Facilities and equipment (Airport and airway trust fund).	D91-7	538,659		10-04-90					
	D91-7A		1,068,473	01-09-91					1,607,132
Total, Deferrals		6,049,754	4,211,082		6,558,111			46,565	3,749,290

[FR Doc. 91-19399 Filed 8-14-91; 8:45 am]

BILLING CODE 3110-01-M

Office of Federal Procurement Policy

Procurement Regulatory Activity Report; Availability

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: Notice of availability of the Procurement Regulatory Activity Report, Number 5.

SUMMARY: Sections 25(g) (1) and (2) of the Office of Federal Procurement Policy (OFPP) Act, as amended by Public Law 100-679, codified at 41 U.S.C. 421(g), require the Administrator for Federal Procurement Policy to publish a report within 6 months after the date of enactment and every 6 months thereafter relating to the development of procurement regulations.

Accordingly, OFPP has prepared the fifth *Procurement Regulatory Activity Report*. This report is designed to satisfy all aspects of sections 25(g) (1) and (2) of the OFPP Act, and includes information on: The status of each regulation; a description of those regulations required by statute; a description of the methods by which public comment was sought; regulations, policies, procedures, and forms under review by the OFPP; whether the regulations have paperwork requirements; the progress made in promulgating and implementing the Federal Acquisition Regulation; and such other matters as the Administrator determines to be useful.

ADDRESSES: Those persons interested in obtaining a copy of the Procurement Regulatory Activity Report may contact the Executive Office of the President Publications Service, room 2200, 725 17th Street, NW, Washington, DC 20503, or phone (202) 395-7332.

Dated: August 8, 1991.

Allan V. Burman,

Administrator.

[FR Doc. 91-19499 Filed 8-14-91; 8:45 am]

BILLING CODE 3110-01-M

OFFICE OF PERSONNEL MANAGEMENT

Request for Expendited review of DPRS-2809; Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces the expedited review by OMB for a revised clearance of information collection, DPRS-2809—Request to Change FEHB Enrollment or to Receive Plan Brochures for Spouse Equity and Temporary Continuation of Coverage Enrollees. The instructions will be submitted for clearance in early September 1991. This form is presently cleared under 3206-0141; however, this form is now being cleared separately and requires a new OMB number at this time. DPRS-2809, is completed by the former spouse of employees, separated employees, or former spouses and children of separated employees who wish to change enrollment in the FEHB program during the annual open season.

Approximately 15,000 forms are completed annually, each requiring approximately 10 minutes to complete for a total public burden of 2,500 hours.

For copies of this proposal, call C. Ronald Trueworthy on (703) 908-8550.

DATES: Comments on this proposal should be received by August 26, 1991. OMB will act upon this clearance within 5 calendar days after the close of the comment period.

ADDRESSES: Send or deliver comments to—

C. Ronald Trueworthy, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street,

NW, CHP 500, Washington, DC 20415 and

Joseph Lackey, OMB Desk Officer, Human Resources and Housing Branch, New Executive Office Building, NW, room 3002, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mary Beth Smith-Toomey, (202) 606–0623.

Office of Personnel Management

Constant Berry Newman,

Director.

[FR Doc. 91–19561 Filed 8–14–91; 8:45 am]

BILLING CODE-6325-01-M

Request for Expedited Review of OPM 2809–EZ1; Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces the expedited review by OMB for a revised clearance of information collection, OPM 2809–EZ1—Open Season Health Benefits Enrollment Change Form or Request for Additional Information. The instructions will be submitted for clearance in early September 1991. This form is presently cleared under 3206–0141; however, this form is now being cleared separately and requires a new OMB number at this time. OPM Form 2809–EZ1, is completed by annuitants or survivor annuitants who wish to change enrollment in the FEHB program during the annual open season.

Approximately 127,913 forms are completed annually, each requiring approximately 30 minutes to complete for a total public burden of 63,957 hours.

For copies of this proposal, call C. Ronald Trueworthy on (703) 908–8550.

DATES: Comments on this proposal should be received by August 26, 1991. OMB will act upon this clearance within 5 calendar days after the close of the comment period.

ADDRESSES: Send or deliver comments to--

C. Ronald Trueworthy, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street, NW, CHP 500, Washington, DC 20415 and

Joseph Lackey, OMB Desk Officer, Human Resources and Housing Branch, New Executive Office Building, NW., room 3002, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mary Beth Smith-Toomey, (202) 606–0623.

Office of Personnel Management.

Constance Berry Newman,

Director.

[FR Doc. 91–19562 Filed 8–14–91; 8:45 am]

BILLING CODE 6325-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-29534; File No. SR-AMEX-91-18]

Self-Regulatory Organizations; Notice of Filing of proposed Rule Change by the American Stock Exchange, Inc., Relating to a Reduction of the Value of the Major Market Index

August 8, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 25, 1991, the American Stock Exchange, Inc. ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to: (i) Reduce the Major Market Index ("XMI" or "Index") to one-half its present value by doubling the divisor used in calculating the Index; (ii) amend Exchange Rule 904C to double the XMI's position and exercise limits; and (iii) modify the calculation of the LT–20 Index ("LT–20") so that it represents one-tenth, rather than one-twentieth, the value of the reduced XMI. In addition, the Amex proposes a non-substantive change to Exchange Rule 904C to specifically identify position and exercise limits for each of its broad based stock indexes.

The text of the proposed rule change is available at the Office of the Secretary, Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The Amex proposes to (i) Decrease the XMI to one-half its present value by doubling the divisor used in calculating the Index; (ii) double the position and exercise limits for XMI options to correspond to the decrease in the Index's value;[1] and (iii) modify the calculation of the LT–20 so that it represents one-tenth, rather than one-twentieth, the value of the reduced XMI. In addition, the Amex proposes a non-substantive change to Exchange Rule 904C to specifically identify position and exercise limits for each of its broad based stock indexes.

Reducing the XMI's Value

The XMI, a broad market index based on 20 leading blue-chip stocks measuring the performance of U.S. industrial corporations, was created by the Exchange in 1983 to serve as underlying index for standardized options trading. XMI options trading commenced on the Amex in April 1983. Historically, the XMI has correlated closely to the Dow Jones Industrial Average as well as other broad market stock indexes.

In July 1984, concurrent with the commencement of XMI futures trading at the Chicago Board of Trade, the Index's then-current value was doubled.[2] Over the past seven years, the Index's value has nearly tripled (as have other broad market indexes) from approximately 220 to 640. As a consequence of the rising Index value, premiums for XMI options have risen substantially, resulting in the XMI being the most expensive index option to trade, particularly for near-the-money contracts (which generally are the most actively traded series). Accordingly, as a result of the reduction in the value of the Index, there will be a substantial

[1] Exchange Rule 904C establishes position limits for stock index options. Exchange Rule 905C provides that the exercise limit for stock index options is the same as the position limits set forth in Exchange Rule 904C.

[2] *See* Securities Exchange Act Release No. 21141 (July 12, 1984), 49 FR 29182 (order approving SR-AMEX-84-18).

lowering of the dollar value of option premiums for XMI contracts.

The Amex now proposes to decrease the XMI's value by one-half. This will be achieved by doubling the divisor used to calculate the Index. No other changes are proposed as to the composition of the Index, its method of calculation (other than the change in the divisor), the expiration style of the options or any other Index specification.

In order to most efficiently effect the change in the Index value, the Exchange plans to adjust outstanding XMI series in a manner similar to the way equity options are adjusted for a 2-for-1 stock split. On the effective date of the split, "ex-date," the number of outstanding XMI option contracts will be doubled and the exercise price of each contract will be reduced by one-half. For example, an investor who is currently at the 17,000 contract limit will, as a result of the Index value reduction, automatically hold 34,000 contracts when the adjustment ("split") is made. Effecting the adjustment in this manner will avoid any confusion associated with having "old" and "new" XMI series and symbol codes.

Currently, the Exchange's LT–20 Index ("LT–20") is computed to represent one-twentieth of the XMI's value. Concurrent with the proposed "split" of the XMI, the Exchange plans to modify the calculation of the LT–20 to represent one-tenth the value of the reduced XMI. Therefore, the LT–20 will remain at the same level but will now represent one-tenth (instead of one-twentieth) of the value of the XMI; accordingly, contract sizes and exercise prices for outstanding LT–20 contracts will remain unchanged.

Increasing the XMI's Position and Exercise Limits

Currently, position and exercise limits for the XMI are 17,000 contracts on the same side of the market, with no more than 10,000 of such contracts in series with the nearest expiration months. Accordingly, in conjunction with the simultaneous reduction of the Index's value, the Amex proposes to double the XMI's position and exercise limits to 34,000 contracts on the same side of the market, with no more than 20,000 of such contracts in series with the nearest expiration months. Since these new limits will be economically equivalent to the XMI's present limits, there will be no additional potential for manipulation of the Index or the underlying securities.

In calculating position limits, the Exchange will continue to aggregate positions in LT–20 option contracts and XMI option contracts Based on the proposed amendment to the XMI, ten LT–20 contracts will equal one XMI contract.

In addition, the Amex proposes a non-substantive amendment to Exchange Rule 904C to specifically identify the position and exercise limits for each of its broad based stock indexes. Specifically, the position limits for LT–20 options will be 340,000 contracts on the same side of the market with no more than 200,000 contracts in series with the nearest expiration month; the position limits for Institutional Index options and for Japan Index options will be 25,000 contracts on the same side of the market with no more than 15,000 contracts in series with the nearest expiration. The Amex believes that the proposed rule change is consistent with section 6(b)(5) of the Act because the proposal is designed to promote just and equitable principles of trade and to protect the investing public.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Amex believes that the proposed rule change will not impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period: (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to the file number in the caption above and should be submitted by September 5, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–19410 Filed 8–14–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–29532; File No. SR–PTC–91–11]

Self-Regulatory Organization; Participants Trust Company; Filing of a Proposed Rule Change Relating to the Creation of a Participants Operating Guide

August 6, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on July 11, 1991, the Participants Trust Company ("PTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The text of the proposed rule change is in the form of a Participants Operating Guide.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, PTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

statements may be examined at the places specified in item IV below. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to consolidate, in one centralized manual called the "Participants Operating Guide," (the "Guide") the daily operating practices and procedures governing transactions between PTC and its Participants. Currently, Participants are advised of the procedures through the distribution of separate Administrative Bulletins and Important Notices.

The Guide sets forth, in detail, such items as the timeframes for input and output of data, methods of billing, a description of the daily settlement process via the book-entry system, and the methods for paying principal and interest. The Guide is a "how-to" manual and does not supersede PTC's Rules and Procedures, which are designed to govern the rights and obligations of participants relative to PTC, its services, and other participants.

Since the proposed rule change facilitates the prompt and accurate clearance and settlement of securities transactions, PTC believes that the proposed rule change is consistent with section 17A of the Act and the rules and regulations thereunder applicable to PTC.

B. Self-Regulatory Organization's Statement on Burden on Competition

PTC does not believe that the proposed rule change will have an impact on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

PTC has not solicited, and does not intend to solicit, comments on this proposed rule change. PTC has not received any unsolicited written comments from Participants or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period: (i) As the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reason for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principle office of PTC. All submissions should refer to File No. SR–PTC–91–11 and should be submitted by September 5, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–19409 Filed 8–14–91; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

Bureau of Oceans and International Environmental and Scientific Affairs

[Public Notice 1453]

U.S. National Committee for Man and the Biosphere; Request for Proposals Fiscal Year 1992

Introduction

The mission of the United States Man and the Biosphere Program (U.S. MAB) is to foster harmonious relationships between humans and the biosphere through an international program of policy-relevant research which integrates social, physical and biological sciences to address actual problems.

To implement this mission, the U.S. National Committee for U.S. MAB hereby announces its priorities and criteria for the selection of original research proposals and projects to receive U.S. MAB support in federal fiscal year 1992, contingent upon the availability of funds. During federal fiscal year 1992, U.S. MAB will concentrate the majority of its available resources on the development of the major core research programs of the U.S. MAB Directorates and the development of a U.S. Biosphere Reserve Action Plan. Consequently the U.S. MAB program intends to make available a relatively modest amount of funds (approximately two hundred fifty thousand dollars) for individual scientist investigators, or small groups of scientists to begin in a limited manner interdisciplinary pilot projects and programs. U.S. MAB funding is aimed at stimulating scientists from different disciplines to work together in the areas described below.

Scientists are encouraged to seek complementary funds from other sources. Funding from U.S. MAB is not intended to substitute for discipline specific support available from other sources.

U.S. MAB will give priority consideration to proposals which directly complement the objectives of the U.S. MAB directorate programs. Proposed research and projects which further the U.S. MAB objectives may be spread over several years. Proposals will be evaluated for the intrinsic merit of the research, their policy relevance, effectiveness in integrating the social and biological sciences, and the quality and demonstrated productivity of the principal investigators. Interested scientists and individuals should write to the U.S. MAB Secretariat to receive copies of the full U.S. MAB Directorate Mission Statements on:

- High Latitude Ecosystems;
- Human Dominated Systems;
- Marine and Coastal Ecosystems;
- Temperate Ecosystems; and
- Tropical Ecosystems.

Program Areas

In the area of High Latitude Ecosystems, U.S. MAB seeks proposals which enhance the understanding and rational management of resources and ecosystems in the high-latitude regions of the United States and other circumpolar northern lands. Proposals to accomplish this should seek participation in and the support of cooperative international endeavors; foster integrated research in biological, physical and the social sciences in applying scientific and technological advances to societal needs; and include

the concerns of multicultural residents and indigenous peoples of the north. Proposals should foster and support informed and rational policy formulation relevant to high-latitude regions including: Sustainable development, global change, and maintenance of biological diversity and stability in high-latitude ecosystems.

In the area of Human Dominated Systems, the U.S. MAB program focuses on ecological systems that are significantly affected by human activities. The Directorate's core program focuses on the central theme of ecological sustainability, attempting to define its meaning and examining a variety of human institutions and policies that impinge upon it.

The Directorate's core project explores these issues through case studies on three U.S. biosphere reserves: The Everglades and surrounding areas of south Florida, the New Jersey Pinelands, and the Virginia Coastal Biosphere Reserve. The goal is explicitly to: (a) Define ecological sustainability for the ecosystems of the case-study biosphere reserves and surrounding areas in terms of particular levels of selected ecological endpoints; (b) evaluate patterns of human uses of environmental resources and other anthropogenic stresses imposed on these ecosystems; (c) examine societal and institutional factors influencing ecological sustainability; and (d) assess their compatibility with essential characteristics of ecological sustainability.

In support of the Human Dominated Systems Directorate core project, investigator-initiated proposals are solicited that advance methodologies for defining ecological sustainability, or understanding its causal relationships with and feedbacks from society. Priority will be given to proposed research and activities that address specific components of the Directorate's coupled human/ecological systems model and/or address specific aspects of one of the selected biosphere reserves.

In the area of Marine and Coastal Ecosystems, U.S. MAB seeks proposals that: Assess the sources, impacts and control of marine pollution, including but not limited to nutrient loading, eutrophication, siltation and relationships to freshwater resources; analyze sea level rises, coastal erosion and other land margin disturbances; assess habitat loss or alteration, including implications for biological diversity; identify and estimate the means for and benefits of preservation of traditional marine and coastal uses; clarify the relationships between natural fluctuations and human perturbations, as with red tides and harmful algal blooms; and investigate fisheries and other living resource management issues.

In the area of Temperate Ecosystems, the U.S. MAB program focuses on the comparative analysis of social and economic processes, land uses, landscape dynamics, and resource effects and environmental quality impacts for the case study areas in the Southern Appalachian Mountains and the Olympic Peninsula of Washington State. An interdisciplinary team of social, biological, and quantitative scientists has developed an integrated approach to studying landscape-level processes coupling humans and their biophysical environment.

U.S. MAB seeks proposals that complement and reinforce the Temperate Ecosystems Directorate core project's theme of management of the temperate landscape for diversity, resilience, productivity and sustainability for the long-term. Proposals and the products of research should: (1) Involve the integration of social and biophysical sciences; (2) address problems of integrating either site or community level processes with landscape processes, or landscape processes with landscape processes, or landscape processes with regional or global processes; and (3) be useful to major land management agencies, landowners and authorities coordination multi-ownership resources. Preference will be given to projects that function as satellite programs and provide pertinent information that is beyond the scope of the Directorate's core project or provide comparative information from other regions or levels of ecological analysis.

In the area of Tropical Ecosystems, U.S. MAB seeks proposals on tropical ecosystem restoration and management of tropical ecosystems. Proposals should be interdisciplinary with a holistic focus, have strong scientific underpinnings, and clear implications for policy and/or decision making. More specifically, the Tropical Ecosystem Directorate is interested in advancing the field of Social Ecology that addresses the interface between the social and natural sciences, especially focusing on analysis of the sustainability of tropical land use systems. Successful proposals must demonstrate that the human aspects of the research are an integral part of the study and must include a clear effort to address the human-biosphere interaction.

Workshops, Conferences and Seminars

Proposals for U.S. MAB endorsement and/or funding of workshops, conferences and seminar activities should describe activities that are especially innovative to merit consideration and are interdisciplinary in order to comply with the interests of the U.S. MAB program.

U.S. MAB will give preference to lending its endorsement and will consider funding workshops, conferences or seminars when:

1. U.S. MAB is involved early in the planning process in order to provide substantial intellectual input;

2. The conference involves interdisciplinary input and participation by scientists from the natural, biological and social sciences; and

3. The conference has a clearly stated relevance and/or focus on governmental (federal, state and/or local) environmental policy.

Because of limited available funding, U.S. MAB will give priority consideration to proposals for workshops, conferences and seminar activities which directly meet the objectives and complement the core research programs of the U.S. MAB directorates.

General Instructions

All potential proposers are encouraged to contact the Secretariat of the U.S. Man and the Biosphere Program (telephone number and address noted below) to request the mission statement or a description of the core program of the particular directorate that their proposal would address. Potential proposers, if invited to submit a full proposal, should expect to be interactive with the relevant U.S. MAB directorate, and the proposal budgets should reflect, within the total amount requested, sufficient funds to implement this interaction.

Preference will be given to proposals that:

• Are interdisciplinary in terms of including the social and natural sciences;

• Request $50,000 or less in total support;

• When seeking initiation or seed funding from U.S. MAB, also indicate potential additional funding sources for continued project support;

• Are submitted by U.S. citizens or persons studying or teaching at U.S. institutions/universities;

• When international, also involve scientists from the host country;

• Deal with environmental policy issues relevant to agencies which support U.S. MAB;

• Within the program areas, utilize units of the International Network of Biosphere Reserves as sites to integrate appropriate project components of monitoring, research, education or demonstration. Proposals concerning activities within biosphere reserves should contain a letter of endorsement from the manager of the relevant biosphere reserve; and

• Propose that the project activities will result in a report that is intended to be a publishable quality in a peer reviewed scientific journal or report.

The U.S. MAB process for evaluating and selecting projects for funding includes a pre-proposal stage. All pre-proposals must be submitted as a prospectus of a maximum length of three (3) pages, which clearly indicates how the potential proposal meets the above stated requisite criteria. Prospectuses must be accompanied by a summary biographic sketch of the potential principal(s) which should include exceptional qualifications and a publication list which is limited to a maximum of 5 titles of articles relevant to the proposed activities and which appeared in peer reviewed journals. Biographic sketches should demonstrate that principals have worked with others from different disciplines; and may not exceed three (3) pages for each principal.

U.S. MAB will not pay overhead fees on grants.

Mail prospectuses to: U.S. MAB Secretariat, OES/EGC/MAB; room 608, SA-37; U.S. Department of State; Washington, DC 20522-3706.

No prospectus will be accepted after November 4, 1991. Prospectuses will be subject to an administrative review for adherence to the requirements listed and will be returned without review if deficiencies are found.

Evaluation and Review Process of Prospectuses

The U.S. MAB Secretariat will distribute prospectuses to the appropriate U.S. MAB directorate. Individual directorates will review the prospectuses based on their responsiveness to this call, relevancy of the proposed activity to their mission statements or approved core program, and the performance competence of the proposed principal(s) as evidenced by the summary biographic sketch.

Prospectuses favorably reviewed by a Directorate will be sent to the U.S. National Committee for MAB for evaluation at the January 1992 National Committee meeting. The National Committee will review each of these prospectuses for its relevance to the U.S. MAB program priorities. The National Committee will then determine which principals will be invited to submit a full proposal. The U.S. National Committee, at its own initiative, may request that additional proposals on specific subjects be submitted for review and consideration.

Evaluation and Review Process of Proposals

Invited prospective investigators should submit proposals which clearly state the objectives, scientific rationale, methodology, personnel, and time and funding requirements. Prospective investigators may also nominate not more than five individuals, who are not members of the same institution as the potential investigator(s), who they believe are qualified to serve as peer reviewers of the proposal to supplement the peer reviewers selected by the U.S. MAB program. The list must include addresses and phone numbers of the nominated reviewers.

Complete project and research proposals must be received by the U.S. MAB Secretariat by close of business May 4, 1992. Proposal texts may not exceed 25 pages, double-spaced, including a two page executive summary describing the objective of the proposed effort and the method of approach. Proposals must be accompanied by a summary biographic sketch of the potential principal(s) which should include exceptional qualifications and a publication list which is limited to a maximum of 5 titles of articles relevant to the proposed activities and which appeared in peer reviewed journals. Biographic sketches should demonstrate that principals have worked with others from different disciplines. The biographic sketch for each principal may not exceed three (3) pages.

If proposed project activities are international in scope, the proposal must provide written evidence that host country permissions on an appropriate level have already been obtained to carry out the project.

All proposals must contain: (1) Clearly defined objectives; (2) a feasible work plan to achieve those objectives within the time frame and resources of the grant; (3) specific work products resulting from the grant with a minimum requirement of an interim and final report. The proposal must state when an interim report will be produced and that a final report will be delivered to the U.S. MAB Secretariat within 90 days of the completion of the grant.

Proposals must indicate how the proposal could complement or assist in problem-solving for funded core Directorate programs.

Proposals must identify one individual for contract purposes and specify one institution to receive and sub-allocate funds for the proposed activities.

Proposals will be subject to an administrative review for adherence to listed requirements and, if deficiencies are found, will be returned without further consideration.

Appropriate U.S. MAB directorate and outside peer reviewers, including specialists in the areas of the proposals, will be selected by U.S. MAB to evaluate each proposals. Evaluative criteria for assessing the proposals include, but are not limited to: the intrinsic scientific or technical merit of the activities; the utility or policy relevance of the research or activities; the interdisciplinarity of the proposed activities; and the performance record of the principal(s).

A final ranking of the proposals will be made by the U.S. National Committee for the Man and the Biosphere Program based on all of the above factors and their assessment of each proposal's relevancy to the goals of U.S. MAB. Proposals will then be funded in the order of their assigned rank and based on availability of funds.

Principals will receive copies of all peer review evaluations made of their proposal and a written notification of the Committee's decision on their project. Selected proposals become part of the public domain; proposals not selected for funding by the U.S. National Committee for MAB will be returned to the authors.

The National Committee will notify all principals of its final decisions in August/September 1992. Funds will be committed to the managing institutions identified in the selected proposals by September 30, 1992.

Agencies supporting the U.S. MAB Program include: The Department of Agriculture-Forest Service, the Department of Energy, the Department of the Interior-National Park Service, the Department of State, the Agency for International Development, the Environmental Protection Agency, the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the National Science Foundation, the Peace Corps, and the Smithsonian Institution.

Dated: August 7, 1991.

Jeffrey A. Miotke,

Acting Director, Office of Global Change.

[FR Doc. 91-19458 Filed 8-14-91; 8:45 am]

BILLING CODE 4710-09-M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Dockets 47595 and 47629; Order 91-8-14]

Application of Ground Air Transfer, Inc. d/b/a Charter One for Certificate Authority and for an Exemption

AGENCY: Department of Transportation.

ACTION: Notice of order to show cause and grant of exemption *pendente lite*.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Ground Air Transfer, Inc. d/b/a Charter One fit, willing, and able, and awarding it a certificate of public convenience and necessity to engage in interstate and overseas air transportation of persons, property, and mail.

DATES: Persons wishing to file objections should do so no later than August 23, 1991.

ADDRESSES: Objections and answers to objections should be filed in Docket 47595 and addressed to the Documentary Services Division (C-55, room 4107), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Ms. Carol A. Woods, Air Carrier Fitness Division (P-56, room 6401), U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-2340.

Dated: August 8, 1991.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 91-19414 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-62-M

[Order 91-8-16; Docket 47675]

Order Setting Procedural Schedule, Joint Application of Delta Air Lines, Inc. and Pan American World Airways, Inc. for Certificate Transfer

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Joint Application of Delta Air Lines, Inc. and Pan American World Airways, Inc. for certificate transfer.

SUMMARY: On August 2, 1991, Delta Air Lines, Inc. and Pan American World Airways, Inc. filed a joint application seeking approval of the transfer to Delta, under section 401(h) of the Federal Aviation Act of 1958, as amended, of the following:

(a) All Pan American's certificate authority between New York and points in Europe;

(b) Pan American's Frankfurt hub operations; and

(c) Pan American's certificate authority to serve the Detroit-London and Miami-London markets.

The Department has established a procedural schedule for the receipt of answers and replies to answers.

DATES: Answers to the application should be filed by August 23, 1991. Replies to answers should be filed by August 30, 1991.

ADDRESSES: Answers and replies to answers should be filed in Docket 47675, addressed to the Documentary Services Division, U.S. Department of Transportation, 400 Seventh Street, SW., room 4107, Washington, DC 20590 and should be served on all parties in Docket 47675.

Dated: August 8, 1991.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 91-19413 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-62-M

[Order 91-8-15]

Proposed Cancellation of Air Taxi Authority of Hutchinson Auto and Air Transport Co., Inc.

AGENCY: Department of Transportation.

ACTION: Notice of proposed cancellation of the air taxi authority held by Hutchinson Auto and Air Transport Co., Inc., order to show cause.

SUMMARY: The Department of Transportation is proposing to cancel the air taxi authority issued to Hutchinson under 14 CFR part 298 within 90 days of the date of the order for failure to meet the citizenship requirement of section 101(16) of the Federal Aviation Act unless Hutchinson is able to restructure its ownership, management, and board of directors to comply with this requirement.

Responses: All interested persons wishing to respond to the Department of Transportation's proposed cancellation action should filed their responses with the Documentary Services Division, C-55, Department of Transportation, room 4107, 400 Seventh Street, SW., Washington, DC 20590, in Docket 47690, and serve them on all persons listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Patricia T. Szrom, Chief, Air Carrier Fitness Division, P-56, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-9721.

Dated: August 8, 1991.

Jeffrey N. Shane,

Assistant Secretary for Policy and International Affairs.

[FR Doc. 91-19412 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-62-M

Federal Highway Administration

Environmental Impact Statement: Wayne Co., NC

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise that an environmental impact statement will be prepared for a proposed highway project in Wayne County, North Carolina.

FOR FURTHER INFORMATION CONTACT: Mr. Robert L. Lee, P.E., District Engineer, Federal Highway Administration, P.O. Box 26806, Raleigh, North Carolina 27611, Telephone (919) 856-4330.

SUPPLEMENTARY INFORMATION: The FHWA in cooperation with the North Carolina Department of Transportation (NCDOT) will prepare an environmental impact statement (EIS) for the proposed Goldsboro Bypass in Wayne County. The proposed action would involve construction of a four-lane divided freeway extending approximately 19 miles from a point on existing US 70 east of the SR 1237 intersection to a point on existing US 70 west of the SR 1731 intersection. Access will be fully controlled and interchanges will be provided at locations with major traffic movements. The proposed project is needed to serve the rapidly growing traffic demand in the US 70 corridor. It will provide an alternate route to existing US 70/US 70 Bypass and will relieve some of the congestion currently on the existing facility.

Alternatives under consideration include the No-Build or Do-Nothing Alternative, the Transportation System Management Alternative, the Mass Transit Alternative, and the Build Alternative. The Build Alternative involves consideration of possible corridors for construction of the proposed roadway on new location as well as the consideration of improvements along the existing US 70/US 70 Bypass alignment.

Solicitation of comments on the proposed action will be sent to appropriate Federal, State and local agencies. A complete public involvement program has been developed for the project to include: the distribution of newsletters to interested

parties, along with public meetings and public hearings to be held in the study area. Information regarding the time and place of the public meetings and the public hearings will be provided in the local news media. The draft EIS will be available for public and agency review and comment prior to the corridor public hearing. No formal scoping meeting is planned at this time.

To ensure that the full range of issues related to the proposed action are addressed and that all significant issues are identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the EIS should be directed to the FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Robert L. Lee,

District Engineer, Raleigh, North Carolina.

[FR Doc. 91-19491 Filed 8-14-91; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirement Submitted to OMB for Review

August 9, 1991.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Internal Revenue Service

OMB Number: 1545-0099.
Form Number: IRS Form 1065, Schedules D and K-1.
Type of Review: Revision.
Title: U.S. Partnership Return of Income (Form 1065); Capital Gains and Losses (Schedule D); and Partner's Share of Income, Credits, Deductions, Etc. (Schedule K-1).
Description: Internal Revenue Code (IRC) 6031 requires partnerships to file returns that show gross income items, allowable deductions, partners' names, addresses, and distribution shares, and other information. This information is used to verify correct reporting or partnership items and for general statistics.
Respondents: Individuals or households, farms, businesses or other for-profit, small businesses or organizations.
Estimated Number of Respondents/ Recordkeepers: 2,033,000.
Estimated Burden Hours Per Respondent/Recordkeeper:

	Form 1965	Schedule D	Schedule K-1
Recordkeeping	38 hrs., 53 min.	5 hrs., 16 min.	24 hrs., 38 min.
Learning about the law or the form.	19 hrs., 58 min.	1 hr., 12 min.	8 hrs., 9 min.
Copying, assembling and sending the form to IRS.	4 hrs., 34 min.	1 hr., 20 min.	8 hrs., 55 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 1,004,660,255 hours.
OMB Number: 1545-0228.
Form Number: IRS Form 6252.
Type of Review: Extension.
Title: Installment Sale Income.
Description: Information is needed to figure and report an installment sale for a casual or incidental sale of personal property, and a sale of real property by someone not in the business of selling real estate. Data is used to determine whether the installment sale has been properly reported and the correct amount of profit included in income on the taxpayer's return.
Respondents: Individuals or households, farms, businesses or other for-profit, non-profit institutions, small businesses or organizations.
Estimated Number of Respondents/ Recordkeepers: 782,848.
Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	1 hour, 52 minutes.
Learning about the law or the form	35 minutes.
Preparing the form	56 minutes.
Copying, assembling and sending the form to IRS.	20 minutes.

Frequency of Responses: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 2,575,570 hours.
OMB Number: 1545-0644.
Form Number: IRS Form 6781.
Type of Review: Revision.
Title: Gains and Losses From Section 1256 Contracts and Straddles.
Description: Form 6781 is used by taxpayers in computing their gains and losses from section 1256 Contracts and Straddles and their special tax treatment. The data is used to verify that the tax reported accurately reflects any such gains and losses.
Respondents: Individuals or households, businesses, or other for-profit, small businesses or organizations.
Estimated Number of Respondents/ Recordkeepers: 100,000
Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	10 hours, 17 minutes.
Learning about the law or the form	2 hours, 28 minutes.
Preparing the form	3 hours, 40 minutes.
Copying, assembling and sending the form to IRS.	16 minutes.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 1,667,000 hours.
OMB Number: 1545-0687.
Form Number: IRS Form 990-T.
Type of Review: Revision.
Title: Exempt Organization Business Income Tax Return.
Description: Form 990-T is needed to compute the section 511 tax on unrelated business income of a charitable organization. The IRS uses the information to enforce the tax.
Respondents: Non-profit institutions.
Estimated Number of Respondents/ Recordkeepers: 28,000.
Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	58 hours., 35 min.
Learning about the law or the form	20 hrs., 20 min.
Preparing the form	32 hrs. 26 min.
Copying, assembling, and sending the form to IRS.	2 hrs., 57 min.

Frequency of Response: Annually.
Estimated Total Reporting/ Recordkeeping Burden: 3,200,680 hours.
OMB Number: 1545-1163.
Form Number: IRS Form 8822.
Type of Review: Revision.
Title: Change of Address.
Description: Form 8822 is used by taxpayers to inform IRS of their change of address. IRS will use this information to update the taxpayer's address of record.
Respondents: Individuals or households, State or local governments, farms, businesses or other for-profit, Federal agencies or employees, non-

profit institutions, small businesses or organizations.

Estimated Number of Respondents: 1,500,000.

Estimated Burden Hours Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting/Recordkeeping Burden: 3,200,680 hours.

Clearance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 91–19480 Filed 8–14–91; 8:45 am]

BILLING CODE 4830–01–M

Departmental Offices

Privacy Act of 1974; New System of Records

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of Proposed New System of Records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, the Department of the Treasury gives notice of a new proposed system of records, Fitness Center Records system, Treasury/DO .201. The purpose of the system is to assist the operators of Treasury's Fitness Center to maintain necessary records pertaining to the members of the facility for efficient and proper use of the facility and in the event of an emergency situation.

DATES: Comments must be received no later than September 16, 1991. The proposed system of records will be effective October 15, 1991, unless the Department receives comments which would result in a contrary determination.

ADDRESSES: Please submit comments to the Director, Administrative Operations Division, Department of the Treasury, room 1212–MT, 1500 Pennsylvania Ave., NW., Washington, DC 20220. Persons wishing to review the comments should make an appointment with the Assistant Director, Disclosure Services at (202) 566–2789.

FOR FURTHER INFORMATION CONTACT: Gary T. Engelstad, Director, Administrative Operations Division, 1500 Pennsylvania Ave., NW., room 1212–MT, Washington, DC 20220, (202) 566–5422.

SUPPLEMENTARY INFORMATION: The new system report, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Operations of the House of Representatives, the Committee on Governmental Affairs of the Senate, and the Office of Management and Budget, pursuant to appendix I to OMB Circular A–130, "Federal Agency Responsibilities for Maintaining Records about Individuals," dated December 12, 1985.

Treasury/DO .201

System Name:

Fitness Center Records.

SYSTEM LOCATION:

Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 22020.

Categories of individuals covered by the system:

Treasury Department employees who have applied for membership and participate in the Treasury fitness program.

Categories of records in the system:

Name, job title, addresses, date of birth, age, sex; name, address, and telephone number of personal physician; name, and address and telephone number of emergency contact; health and exercise history; physician's clearance; informed consent form, waiver and release form, program interest survey form; fitness assessment results; and results of health tests taken by the Fitness Center members.

Authority for the maintenance of the system:

5 U.S.C. 301.

PURPOSE(S)

The records are collected and maintained to provide the Fitness Center contractor with written documentation of user's membership status. The records enable the contractor to identify the current fitness level and potential health risks faced by each user. The collection of these records provides essential baseline information allowing the contractor to prescribe the appropriate exercise program to each user.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF EACH USE:

No disclosures will be made outside the Departmental offices.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and magnetic media.

RETRIEVABILITY:

By name and membership number.

SAFEGUARDS:

Records are stored in locked cabinets in a locked room. Access is limited to authorized employees of the contractor responsible for servicing the records in the performance of their duties.

RETENTION AND DISPOSAL:

Active records are retained indefinitely. Inactive records are held for three years, then are destroyed by shredding.

SYSTEM MANAGER AND ADDRESS:

Director, Administrative Operations, Department of the Treasury, Room 1212–MT, 1500 Pennsylvania Ave., NW, Washington, DC 20220. Name of the contractor will be provided by the system manager upon request.

NOTIFICATION PROCEDURES:

Individuals seeking access to any record contained in the system of records, or seeking to contest its content, may inquire in accordance with instructions appearing at 31 CFR part 1, subpart C, appendix A. Inquiries should be addressed to Assistant Director, Disclosure Services, Department Offices, Room 1054–MT, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

RECORD ACCESS PROCEDURES:

Inquiries should be addressed to the Assistant Director, Disclosure Services, Department Offices, Room 1054–MT, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

CONTESTING RECORD PROCEDURES:

See "Notification procedures" above.

RECORD SOURCE CATEGORIES:

The source of the data is the Treasury Department employee who has applied for membership, contractor personnel and the employee's personal physician.

SYSTEM EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Dated: August 8, 1991.

David M. Nummy,

Acting Assistant Secretary (Management).

[FR Doc. 91–19479 Filed 8–14–91; 8:45 am]

BILLING CODE 4810–25

DEPARTMENT OF VETERANS AFFAIRS

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Janet G. Byers, Veterans Benefits Administration (20A5), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 233-3021.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before September 16, 1991.

Dated: August 8, 1991.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

Extension

1. Application for Accrued Amounts of Veteran's Benefits Payable to Surviving Spouse, Child or Dependent Parents, VA Form 21-614.

2. The form is used by a dependent, who has not filed for death benefits, to file a claim for accrued benefits available at the time of the veteran's death. The information is used to determine entitlement to these accrued benefits.

3. Individuals or households.

4. 1,200 hours.

5. 30 minutes.

6. On occasion.

7. 2,400 respondents.

[FR Doc. 91-19422 Filed 8-14-91; 8:45 am]

BILLING CODE 8320-01-M

Information Collection Under OMB Review

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

The Department of Veterans Affairs has submitted to OMB the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). This document lists the following information: (1) The title of the information collection, and the Department form number(s), if applicable; (2) a description of the need and its use; (3) who will be required or asked to respond; (4) an estimate of the total annual reporting hours, and recordkeeping burden, if applicable; (5) the estimated average burden hours per respondent; (6) the frequency of response; and (7) an estimated number of respondents.

ADDRESSES: Copies of the proposed information collection and supporting documents may be obtained from Ann Bickoff, Veterans Health Administration (161B3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 (202) 535-7407.

Comments and questions about the items on the list should be directed to VA's OMB Desk Officer, Joseph Lackey, NEOB, room 3002, Washington, DC 20503, (202) 395-7316. Do not send requests for benefits to this address.

DATES: Comments on the information collection should be directed to the OMB Desk Officer on or before September 16, 1991.

Dated: August 8, 1991.

By direction of the Secretary.

Frank E. Lalley,

Associate Deputy, Assistant Secretary for Information Resources Policies and Oversight.

Reinstatement

1. Authorization and Invoice for Medical and Hospital Services, VA Form 10-7078; Authority and Invoice for Travel by Ambulance or other Hired Vehicle, VA Form 10-2511; and Claim for Payment of Cost of Unauthorized Medical Services, VA Form 10-583.

2. Description of the Need and Use.

a. VA Form 10-7078 is used in VA medical facilities to authorize expenditures from the medical care account and process payment of medical and hospital services provided by other than Federal health providers to VA beneficiaries.

b. VA Form 10-2511 is used in VA facilities to authorize expenditures from the beneficiary travel account and process payment for ambulance or other hired vehicular forms of transportation for eligible veterans to and from VA health care facilities for examination, treatment or care.

c. VA Form 10-583 is used by health care providers to claim payment for cost of treatment and by veterans to claim reimbursement for the cost of treatment obtained without prior approval of VA.

3. Individuals or households; State or local governments; Farms; Businesses or other for-profit; Federal agencies or employees; Non-profit institutions; Small businesses or organizations.

4. 29,550 hours.

5. Estimated Average Burden Hours Per Respondent.

a. VA Form 10-7078—2 minutes.

b. VA Form 10-2511—2 minutes.

c. VA Form 10-583—15 minutes.

6. On occasion.

7. 443,250 respondents.

[FR Doc. 91-19423 Filed 8-14-91; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 158
Thursday, August 15, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

UNITED STATES COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Georgia Advisory Committee

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the Georgia Advisory Committee to the Commission will convene at 2:00 p.m. and adjourn at 4:00 p.m. on Wednesday, September 4, 1991, at the Candler Building, 127 Peachtree Street, Atlanta, Georgia 30303. The purpose of the meeting is: (1) To orient the newly appointed Committee; (2) to discuss the status of the Commission; (3) to hear a report on civil rights progress and/or problems in the State; and (4) to discuss the adopted project for fiscal year 1992.

Persons desiring additional information, or planning a presentation to the Committee, should contact Georgia Committee Chairperson Dale M. Schwartz (404/658–8097) or Bobby D. Doctor, Director, Southern Regional Division of the U.S. Commission on Civil Rights (404/730–2476, TDD 404/730–2481). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Southern Regional Division at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, D.C., August 13, 1991.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 91–19614 Filed 8–13–91; 2:02 pm]

BILLING CODE 6335–01–M

FEDERAL ELECTION COMMISSION

DATE AND TIME: Tuesday, August 20, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.
Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, August 22, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Future Meetings
Advisory Opinion 1991–20: Call Interactive
Advisory Opinion 1991–25: Mr. Anthony May on behalf of the Pennsylvania Democratic State Committee, and Mr. Thomas Druce on behalf of the Pennsylvania Republican State Committee
Proposed Revisions to Bank Loans
Fiscal Year 1993 Budget Request
Administrative Matters

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 376–3155.

Delores Harris,

Administrative Assistant, Office of the Secretariat.

[FR Doc. 91–19654 Filed 8–13–91; 2:02 pm]

BILLING CODE 6715–01–M

UNITED STATES POSTAL SERVICE BOARD OF GOVERNORS

Notice of Vote to Close Meeting

At its meeting on August 8, 1991, the Board of Governors of the United States Postal Service voted unanimously to close to public observation is meeting scheduled for September 9, 1991, in Ottawa, Canada. The members will consider the anticipated Opinion and Further Recommended Decision of the Postal Rate Commission in Docket No. R90–1.

The meeting is expected to be attended by the following persons: Governors Alvarado, Daniels, del Junco, Griesemer, Hall, Mackie, Nevin, Pace and Setrakian; Postmaster General Frank, Deputy Postmaster General Coughlin, Secretary of the Board Harris, and General Counsel Hughes.

The Board determined that pursuant to section 552b(c)(3) Title 5, United States Code, and section 7.3(c) of Title 39, Code of Federal Regulations, this portion of the meeting is exempt from the open meeting requirement of the Government in the Sunshine Act [5 U.S.C. 552b(b)] because it is likely to disclose information in connection with proceedings under Chapter 36 of Title 39, United States Code (having to do with postal ratemaking, mail classification and changes in postal services), which is specifically exempted from disclosure by section 410(c)(4) of Title 39, United States Code.

The Board has determined further that pursuant to section 552b(c)(10) of Title 5, United States Code, and section 7.3(j) of Title 39, Code of Federal Regulations, the discussion is exempt because it is likely to specifically concern participation of the Postal Service in a civil action or proceeding involving a determination on the record after opportunity for a hearing. The Board further determined that the public interest does not require that the Board's discussion of the matter be open to the public.

In accordance with section 552b(f)(1) of Title 5, United States Code, and section 7.6(a) of title 39, Code of Federal Regulations, the General Counsel of the United States Postal Service has certified that in his opinion the meeting may properly be closed to public observation pursuant to section 552(c) (3) and (10) of Title 5, United States Code; section 410(c)(4) of Title 39, United States Code; and section 7.3 (c) and (j) of Title 39, Code of Federal Regulations.

Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268–4800.

David F. Harris,

Secretary.

[FR Doc. 91–19670 Filed 8–13–91; 3:35 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

Agency Meeting

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [56 FR 37953, August 9, 1991].

STATUS: Open.

PLACE: 450 Fifth Street, N.W., Washington, DC.

DATE PREVIOUSLY ANNOUNCED: Tuesday, August 6, 1991.

CHANGE IN THE MEETING: Rescheduling.

Open meeting scheduled for Thursday, August 15, 1991, at 10:00 a.m. has been rescheduled for Wednesday, August 14, 1991, at 10:00.

The subject matter of the open meeting scheduled for Wednesday, August 14, 1991, at 10:00 a.m., will be:

1. Consideration of whether to propose for public comment rules implementing the shareholder Communications Improvement Act of 1990. The proposed rule would: (1) Revise the shareholder communications rules to require brokers and banks that hold shares in nominee name to forward to beneficial owners of securities the proxy materials and information statements of investment companies registered under the Investment Company Act of 1940; (2) revise the shareholder communications rules to require brokers and banks to forward to beneficial owners the information statements or registrants under Section 12 of the Securities Exchange Act of 1934; and (3) revise the information statement rules to require all investment companies registered under the Investment Company Act of 1940 to transmit information statements to shareholders where proxies are not solicited. For further information, please contact Kathleen K. Clarke at (202) 272–2107.

2. Consideration of whether to adopt a new rule, Rule 3a–6 under the Investment Company Act of 1940 (the "Act"). The rule would provide an exception from the definition of "investment company" for foreign banks and foreign insurance companies for all purposes under the Act. Adoption of the rule would permit foreign banks, foreign insurance companies, and related entities such as finance subsidiaries and holding companies, to offer and sell their securities in the United States without registering as investment companies under the Act or seeking individual exemptions from the Act's requirements. For further information, please contact Ann M. Glickman at (202) 272–3042.

3. Consideration of whether to propose for public comment rules implementing the large trader reporting section of the Market Reform Act of 1990. The proposed rules would: (1) Require a person that effects significant quantities of transactions in publicly traded securities to file Form 13H with the Commission disclosing such person's identity, affiliations and accounts; (2) require broker-dealers that carry accounts to maintain records of transactions in publicly traded securities effected by or for such person's accounts; and (3) require such broker-dealers to report to the Commission upon request, transactions in publicly traded securities effected by or for such person's accounts. For further information, please contact Nicholas T. Chapekis at (202) 272–3115.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Edward Pittman at (202) 272–2400.

Dated: August 12, 1991.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–19533 Filed 8–12–91 4:23 pm]

BILLING CODE 8010–01–M

TENNESSEE VALLEY AUTHORITY

[Meeting No. 1441]

TIME AND DATE: 1 p.m. (EDT), August 19, 1991.

PLACE: TVA Knoxville Office Complex, 400 West Summit Hill Drive, Knoxville, Tennessee.

STATUS: Open.

AGENDA: Approval of minutes of meeting held on July 16, 1991.

ACTION ITEMS:

New Business

E—Real Property Transactions

E1. 15-Year Grant of Easement Affecting Approximately 6181 Acres of Pickwick Reservoir Land in Lauderdale County, Alabama.

F—Unclassified

F1. Personal Services Contract with Stone & Webster Engineering Corporation for Quality Control Functions for Watts Bar Nuclear Plant Unit 1.

F2. Personal Services Contract with Stone & Webster Engineering Corporation for Performance of Construction Support Activities for Browns Ferry Nuclear Plant Units 2 and 3.

F3. Supplement to Personal Services Contract No. TV–82909V with B&W Nuclear Service Company.

F4. Contract with Ebasco Constructors, Incorporated, for Construction Completion Activities for Watts Bar Nuclear Plant Unit 1.

F5. Amendment to Bellefonte Fuel Contract 71P65–99–2 with Babcock and Wilcox Fuel Company.

INFORMATION ITEM:

1. Amendment to Section 8 of the Rules and Regulations of the TVA Retirement System.

CONTACT PERSON FOR MORE INFORMATION: Alan Carmichael, Manager of Media Relations, or a member of his staff can respond to requests for information about this meeting. Call (615) 632–6000, Knoxville, Tennessee. Information is also available at TVA's Washington Office (202) 479–4412.

Dated: August 12, 1991.

Edward S. Christenbury,

General Counsel and Secretary.

[FR Doc. 91–19563 Filed 8–13–91; 9:58 am]

BILLING CODE 8120–08–M

Corrections

Federal Register
Vol. 56, No. 158
Thursday, August 15, 1991

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 10

[Docket No. 910764-1164]

RIN 0651-AA27

Duty of Disclosure

Correction

In proposed rule document 91-18588 beginning on page 37321 in the issue of Tuesday, August 6, 1991, make the following correction:

On page 37321, in the third column, the RIN number reads as set forth above.

BILLING CODE 1505-01-D

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. QF91-138-000, et al.]

Hadson Power Partners of Rensselaer, et al.; Electric Rate Small Power Production, and Interlocking Directorate filings

Correction

In notice document 91-18203 beginning on page 36789 in the issue of Thursday, August 1, 1991, make the following correction:

On page 36790, in the first column, the Docket Number for "**9. Public Service Company of Oklahoma**" should read "[Docket No. ER91-545-000]".

BILLING CODE 1505-01-D

FEDERAL LABOR RELATIONS AUTHORITY

Privacy Act of 1974; Establishment of a New System of Records

Correction

In notice document 91-17269 beginning on page 33291 in the issue of Friday, July 19, 1991, make the following corrections:

1. On page 33292, in the first column, under **SYSTEM NAME:** the entry should read: "FLRA/OIG-1-Office of the Inspector General Investigative Files."
2. On the same page, in the third column, in paragraph (5), in the sixth line, "other refined" should read "otherwise refine".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 101 and 102

[Docket No. 80N-0140]

RIN 0095-AC48

Food Labeling; Declaration of Ingredients; Common or Usual Name for Nonstandardized Foods; Diluted Juice Beverages

Correction

In proposed rule document 91-15772 beginning on page 30452 in the issue of Tuesday, July 2, 1991, make the following correction:

On page 30454, in the third column, in the fourth line, "next" should read "net".

BILLING CODE 1505-01-D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91F-0264]

Stockhausen, Inc.; Filing of Food Additive Petition

Correction

In notice document 91-18313 appearing on page 36815 in the issue of Thursday, August 1, 1991, make the following correction:

On page 36815, in the second column, in the third line, "9B149" should read "9B4149".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Part 870

RIN 1215-AA63

Restriction on Garnishment

Correction

In rule document 91-16585 beginning on page 32254 in the issue of Monday, July 15, 1991, make the following correction:

§ 870.10 [Corrected]

On page 32255, in § 870.10(c)(4), in the first entry in the table, in the sixth column, "4580.67" should read "580.67".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 90-AWA-16]

Proposed Establishment of the Manchester Airport/Grenier Industrial Airpark Radar Service Area; NH

Correction

In proposed rule document 91-16726 beginning on page 32138 in the issue of Monday, July 15, 1991, make the following correction:

§ 71.501 [Corrected]

On page 32143, in the third column, in § 71.501, in the first line of the heading, "Industries" should read "Industrial".

BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION

Maritime Administration

46 CFR Part 221

[Docket No. R-125]

RIN 2133-AA79

Regulated Transactions Involving Documented Vessels and Other Maritime Interests

Correction

In rule document 91-15785 beginning on page 30654 in the issue of Wednesday July 3, 1991, make the following correction:

On page 30655, in the first column, in the second complete paragraph, in the last line, "expected" should read "excepted".

BILLING CODE 1505-01-D

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Parts 3 and 13

RIN 2900-AF07

Limitation on Compensation Benefits for Certain Incompetent Veterans; Computation of Estate

Correction

In proposed rule document 91-13095 beginning on page 25399 in the issue of Tuesday, June 4, 1991, make the following corrections:

1. On page 25399, under SUPPLEMENTARY INFORMATION, in the seventh line, "Veterans" should read "Veteran".

2. On page 25400, in the second column, in amendatory instruction 2. "Underdesignated" should read "undesignated".

BILLING CODE 1505-01-D

Thursday
August 15, 1991

Part II

Nuclear Regulatory Commission

10 CFR Parts 2, 30, 40, 50, 60, 61, 70, 72, 110, and 150

Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons; Final Rule

Privacy Act of 1974; Report of New System of Records; Notice

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 30, 40, 50, 60, 61, 70, 72, 110, and 150

RIN 3150-AD53 and 3150-AD38

Revisions to Procedures to Issue Orders; Deliberate Misconduct by Unlicensed Persons

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to (1) revise its procedures for issuing orders to include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction, (2) identify the types of Commission orders to which hearing rights attach, and (3) put licensed and unlicensed persons on notice that they may be subject to enforcement action for deliberate misconduct that causes, or but for detection, would have caused a licensee to be in violation of any of the Commission's requirements, or for deliberately providing, to the NRC, a licensee, or contractor, information which is incomplete or inaccurate in some respect material to the NRC. These rules will establish procedures to be used in issuing orders to licensed and unlicensed persons to provide reasonable assurance that licensed activities will be conducted in a manner that will protect the public health and safety. In addition, the Commission is revising its Enforcement Policy to reflect the new rules.

EFFECTIVE DATE: September 16, 1991.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-0741; Mary E. Wagner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone: (301) 492-1683.

SUPPLEMENTARY INFORMATION:

I. Background

On April 3, 1990, the Nuclear Regulatory Commission published in the **Federal Register** (55 FR 12370) proposed revisions to procedures to issue orders and (55 FR 12374) a proposed rule concerning willful misconduct by unlicensed persons. The proposed revisions to procedures for issuing orders would include persons not licensed by the Commission but who are otherwise subject to the Commission's jurisdiction. The proposed revisions would also identify the types of Commission orders to which hearing rights attach. The proposed rule on willful misconduct would put unlicensed persons on notice that they may be subject to enforcement action (1) for willfully causing a licensee to violate any of the Commission's requirements or (2) for other willful misconduct that (a) arises out of activities within the jurisdiction of the NRC and (b) places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety. The Commission is promulgating the two proposed actions, as modified, in this single final rule.

A. Revisions to Procedures to Issue Orders

The procedures to be followed by the Commission to initiate formal enforcement action are found in the Commission's Rules of Practice set forth in 10 CFR part 2, subpart B. These actions currently include notices of violation, described in § 2.201, show cause orders, described in § 2.202, orders to modify licenses, described in § 2.204, and civil penalties, described in § 2.205.

Until 1983, with the exception of the civil penalty procedures in § 2.205, the language in these procedures referred solely to licensees. At that time, it was recognized that the Commission's regulations did not provide a procedural mechanism to issue a formal notice of violation to an unlicensed person (corporate or individual) who had violated Commission requirements. For example, by referring only to licensees, the procedures in § 2.201 did not address issuing a notice of violation to a person who possessed radioactive material without a license in violation of Commission requirements or to an unlicensed person who violated provisions of 10 CFR part 21, which implements section 206 of the Energy Reorganization Act of 1974. Consequently, the Commission amended its regulations to permit the issuance of notices of violation to unlicensed persons who violated Commission requirements. Changes were published in the **Federal Register** on September 28, 1983 (48 FR 44170) to amend § 2.200 (Scope of subpart) and § 2.201 (Notice of violation) to add the phrase "or other person subject to the jurisdiction of the Commission."

As stated above, the provisions for issuing show cause orders only address licensees. As discussed in the statement of considerations accompanying the proposed rule, the Commission, in practice, has fashioned orders to non-licensees where necessary to compel a person to cease unauthorized activities that would require a license or to compel actions by a former licensee with respect to its activities previously under license. See *e.g., Michael F. Dimun*, 54 FR 12704 (March 28, 1989); *Pacific Armatechnica Corp.*, 48 FR 38356 (Aug. 23, 1983). The Commission's statutory authority to issue orders, which is found in section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2201, is not limited solely to licensees. In fact, the Commission's Atomic Energy Act authority to issue orders is extremely broad, extending to any person (defined in section 11s to include, e.g., any individual, corporation, federal, state and local agency) who engages in conduct within the Commission's subject matter jurisdiction. The few court cases which deal with the scope of the general authority Congress has granted the Commission usually do so in a general discussion or in passing and conclude that section 161 confers uniquely broad and flexible authority on the Commission. See *Power Reactor Dev. Co.* v. *International Union of Elec. Radio and Mach. Workers AFL-CIO*, 367 U.S. 396 (1961); *Connecticut Light and Power Co.* v. *Nuclear Regulatory Comm'n*, 673 F.2d 525, 527, n. 3 (D.C. Cir. 1982); *New Hampshire* v. *Atomic Energy Comm'n*, 406 F.2d 170, 173–74 (1st Cir. 1969); *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 779, 783 (D.C. Cir. 1968); *but cf. Reynolds* v. *United States*, 286 F.2d 433 (9th Cir. 1960) (interpreting section 161i in detail and holding, in the context of the AEC's bomb testing activities, that section 161i(3) authorized the AEC to take action to govern the activities of private licensees and not the activities of the Commission itself; the court's use of the word "licensee" is dictum with

regard to the term in the context of this notice).

Cases analyzing the Federal Communications Commission's (FCC) enabling statute, which, in many ways, is analogous to the 1954 Act, also support the principle that the Commission's authority is wide in scope. The Federal Communications Act of 1934 (the 1934 Act) broadly authorizes the FCC to "make such rules and regulations, and issue such orders, not inconsistent with (the 1934 Act), as may be necessary in the execution of its functions", 47 U.S.C. 154i (1982). This provision is similar to section 161i(3) of the Atomic Energy Act of 1954, which authorizes the Commission to "prescribe such rules, regulations, and orders as it may deem necessary to govern any activity authorized pursuant to the (Atomic Energy Act of 1954) * * * in order to protect health and to minimize danger to life or property * * *." 42 U.S.C. 2201(i)(3) (1982). A number of cases have analyzed section 154i in detail and determined that the FCC's ordering authority is necessarily broad. *See Federal Communications Comm'n* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 at 793 (1978); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 at 203 (1955); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 at 196 (1943); *Lincoln Telephone and Telegraph Co.* v. *Federal Communications Comm'n*, 659 F.2d 1092 (D.C. Cir. 1981); *American Telephone and Telegraph* v. *Federal Communications Comm'n*, 487 F.2d 865 (2d Cir. 1973); *GTE Service Corp.* v. *Federal Communications Comm'n*, 474 F.2d 724 (2d Cir. 1973); and *Western Union Telegraph Co.* v. *United States*, 267 F.2d 715, 722 (2d Cir. 1959). It has been held that the FCC has authority to issue orders under section 154i of the Federal Communications Act to persons whether licensed or not. *United States* v. *Southwestern Cable*, 392 U.S. 157, 180–81 (1968).

Section 161i provides broad authority to issue orders as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue orders to establish standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material. As relevant here, section 161o authorizes the Commission to order reports as may be necessary to effectuate the purposes of the Act.

Given the Commission's extensive statutory authority, it is appropriate to amend 10 CFR 2.202 to have the procedural mechanism in place to issue orders, as necessary, to unlicensed persons when those persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is considered necessary to protect public health and safety or to minimize danger to life or property or to protect the common defense and security. In addition, the procedural mechanism for issuing Demands for Information to licensees and other persons is set forth in a separate section in order to clarify that the right to a hearing does not attach at the time of issuance of a simple Demand for Information.

B. Deliberate Misconduct by Unlicensed Persons

Over the years, the Commission has, in most cases, issued licenses to organizations rather than individuals. Likewise, the Commission's enforcement program holds the licensees responsible not only for the conduct of operations, but also for the conduct of their employees, consultants, or contractors. Until now, enforcement actions concerning persons who have willfully caused violations of Commission requirements or otherwise have engaged in willful misconduct in connection with licensed activities consisted of actions against licensees, including Notices of Violations, civil penalties, and orders modifying the license to direct removal of the individual from licensed activities at the licensed facility where the violation occurred, or orders confirming that the licensee has removed an individual from licensed activities. These actions frequently only indirectly reach an individual.

Instances of willful misconduct on the part of unlicensed individuals have reduced the NRC's confidence that if these individuals were involved subsequently in licensed activities the activities would be conducted in a manner that adequately protects public health and safety. This conduct has included deliberate violations of NRC requirements, falsification of records, false statements to the NRC, and interfering with NRC investigations, as well as other forms of wrongdoing. After becoming aware of such conduct by an employee, a licensee may dismiss the employee either by its own decision or because the NRC formally orders removal of the employee from licensed activity. However, the wrongdoer may seek other employment in the same field at another NRC or Agreement State-licensed facility, often without the knowledge of the NRC or knowledge by the new employer of the employee's prior conduct. Willful acts of licensees' contractors, vendors, or their employees have caused licensees to be in violation of Commission requirements. Therefore, the Commission believes that additional enforcement options are needed to address directly persons who are not themselves licensees, but are or have been engaged in licensed activities and whose deliberate misconduct, directly or indirectly, causes a licensee to be in violation of a Commission requirement. "Licensed activities," as used in this rule, includes those actions that enable a licensee to carry out its license.[1] Although the Commission's concerns extend to all willful misconduct and the proposed rule applied to that conduct, as discussed in Part III, *infra*, the final rule adopted here addresses only deliberate misconduct.

Accordingly, the Commission is amending its regulations to put on notice all persons whose actions relate to a licensee's activities subject to NRC regulation, that they may be subject to enforcement action for deliberate misconduct that "* * * causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission * * *." The amendment also puts those same persons on notice of their individual liability for deliberate submission of incomplete or inaccurate information to the NRC, a licensee, contractor, or subcontractor. These changes make any person who violates these requirements subject to the enforcement actions described in 10 CFR part 2, subpart B. That subpart provides for issuance of Notices of Violation, civil penalties, and orders.

These changes will allow the Commission to utilize the full range of enforcement sanctions, where warranted, against any person who engages in deliberate misconduct, or deliberately submits incomplete or inaccurate information, as provided in the rule. This includes licensees, licensee employees, contractors,

[1] Licensed activity as used in this context is a broad term, coextensive with the Commission's jurisdiction, that encompasses all of those activities that a licensee, employees of a licensee, or a licensee's contractors, subcontractors, and employees of contractors or subcontractors, perform to permit the licensee to carry out activities licensed by the Commission in accordance with Commission requirements, whether performed on or off site. Licensed activities do not include actions of states and local governments, such as issuing permits or participating in emergency response activities, that enable a licensee to conduct licensed activities. However, licensed activities do include actions by state and local governments to the extent they are operating as NRC licensees.

subcontractors, and employees of contractors or subcontractors. Although certain deliberate misconduct may not cause a violation of a Commission requirement due to detection before the violation actually occurs, consideration of a sanction is appropriate in these cases, as the intent to engage in misconduct was present and improper action initiated. Similarly, individual enforcement action is appropriate for deliberately providing materially incomplete or inaccurate information that might affect NRC decisions concerning protection of the public health and safety. The Commission emphasizes that, by taking action against these persons, it does not intend to diminish the responsibility of a licensee for the conduct of its employees and therefore, as appropriate, the Commission also will be taking action against the licensee directly.

This rulemaking concerning deliberate misconduct implements the Commission's authority under the Atomic Energy Act of 1954, as amended, to issue regulations and orders to any person (defined in section 11s to include, e.g., an individual, corporation, firm or a Federal, State or local agency) who engages in conduct affecting activities within the Commission's subject-matter jurisdiction. As discussed above, the few court cases that deal with the scope of the general authority Congress has granted the Commission usually treat the issue in the general discussion or in passing, concluding that section 161 confers uniquely broad and flexible authority on the Commission. As discussed above, cases analyzing the Federal Communications Commission's (FCC) enabling statute also support the principle that the Commission's authority is wide in scope.

Section 161i provides broad authority to issue regulations as the Commission deems necessary to govern any activity authorized pursuant to the Atomic Energy Act in order to protect the public health and safety. Section 161b similarly authorizes the Commission to issue regulations to impose "standards and instructions" on persons to govern the possession and use of special nuclear material, source material, and byproduct material, as may be necessary or desirable to provide for the common defense and security and protect the public health and safety.

Section 234 of the Atomic Energy Act authorizes the NRC to impose civil penalties on unlicensed individuals, including those who conduct licensed activities as employees of licensees, for violation of the NRC's substantive requirements. Section 234 reads as follows:

a. Any person who (1) violates any licensing provision of section 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, or 109 or any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 186 [of the 1954 Act], shall be subject to a civil penalty, to be imposed by the Commission, of not to exceed $100,000 for each such violation * * *.

The licensing provisions listed in section 234a generally prohibit the possession, use, receipt, or transfer of nuclear materials or facilities unless authorized by and in accordance with a license. The changes are made under the authority of 161 b and i and the above-identified licensing provisions. The changes apply to any person who engages in deliberate misconduct, or deliberately submits incomplete or inaccurate information, as provided in the rule. By imposing a direct prohibition on unlicensed persons, the Commission may now be able to exercise its section 234 authority to impose civil penalties on unlicensed persons who deliberately cause a licensee to be in violation of requirements because they are persons who violate the licensing provisions enumerated in section 234. In cases where the Commission issues an order (other than an order imposing a civil penalty) to a person based on deliberate misconduct that causes a licensee to be in violation of a Commission requirement, the order would be issued, in part, pursuant to a regulation (e.g., proposed § 50.5) that was promulgated under a licensing provision of the Atomic Energy Act, and a civil penalty could be available for violations of such an order. In addition, criminal sanctions under section 223 are available for willful violations of orders and regulations under sections 161 b and i. Injunctions are also available under section 232 for violations of Commission orders.

II. Analysis of Public Comments

In response to the April 3, 1990 proposed rule(s), the Commission received comments from thirty-eight organizations or individuals. Of these, only two indicated support for either of the rules as a whole, although some commenters indicated partial support to the extent that the rules would provide some protection to licensees from vendors and individuals who violate regulations and those who provide false information to licensees who then give the information to the Commission. While several commenters expressed support for the Commission's goal of addressing willful misconduct by individuals, they disagreed with the proposed approach. Sixteen of the commenters were utilities with nuclear power plants or their representatives and another six were vendors or manufacturers. Three materials licensees commented. Seven private citizens, three public interest groups, and three professional or trade organizations submitted comments. Copies of the comments may be examined and for a fee copied at the NRC Public Document Room, 2120 L Street NW. (Lower Level), Washington, DC. A summary of comments with the Commission's responses appears below.

A. Legal Issues

1. NRC Jurisdiction Over Unlicensed Persons

Comment: Several commenters felt that there is no statutory basis in the Atomic Energy Act of 1954 (the 1954 Act) to support the issuance of orders to unlicensed persons.

Response: In enacting section 161 of the 1954 Act, Congress conferred uniquely broad and flexible authority on the Commission. Specifically, Congress authorized the Commission in section 161 to "prescribe such * * * regulations * * * as it may deem necessary to govern any activity authorized pursuant to [the 1954 Act], in order to protect health and minimize danger to life and property." From the absence of specific provisions setting forth the limits of the NRC's personal jurisdiction, it is clear that the 1954 Act authorizes the Commission to promulgate its personal jurisdiction regulations within its discretion in order to effect the purposes of the Act.

Section 161b authorizes the Commission to exercise very broad powers to protect the public health and safety from radiological hazards. The section authorizes the Commission to impose orders on entities that engage in particular activities—without regard to the nature of the entities, as the Commission deems necessary or desirable. When an entity takes part in activities specified in section 161b, then section 161b authorizes the NRC to regulate that entity; whether an individual holds an NRC license or not is irrelevant to this inquiry. Similarly, section 161i authorizes the Commission to issue orders in its discretion ("as it may deem necessary") to exercise regulatory power over ("to govern") activities "authorized pursuant to this Act", and does not specify entities (e.g., licensed or unlicensed) over which such power may be exercised. Section 161o

authorizes the Commission to require by order such reports "as may be necessary to effectuate the purpose of [the 1954] Act", again not limiting the Commission's jurisdiction to a particular class of entities. By the terms of section 161, the reach of the Commission is not confined to those who hold licenses from the Commission.

Comment: Some commenters argued that the cases cited in the Supplementary Information discussion for the proposed rule do not support the proposition that the NRC's jurisdiction to issue orders extends beyond the entities which hold licenses from the Commission.

Response: As noted in the Supplementary Information discussion, there are few court cases dealing with the scope of general authority granted to the NRC. The cases cited for the proposition that the NRC's jurisdiction is uniquely broad and flexible deal with "subject matter" jurisdiction of the NRC and not with "personal" jurisdiction, but are nevertheless supportive of the view that the NRC's personal jurisdiction is broad.

Where Congress does not include statutory provisions governing *in personam* jurisdiction, it is appropriate to look to the scope of subject matter jurisdiction in order to determine the scope of *in personam* jurisdiction. Since Congress did not include any specific personal jurisdiction provisions in the 1954 Act, or any limitations on such jurisdiction, the NRC is authorized to assert its personal jurisdiction over persons based on the maximum limits of its subject matter jurisdiction. The agency's personal jurisdiction is established when a person acts within the agency's subject matter jurisdiction.

While some commenters discount the relevance of the cited cases because they concern the application of the Commission's authority to license entities, the context in which the cases arose does not diminish the courts' conclusions that the Commission's authority is uniquely broad and flexible. The cases presented support the statement that the NRC's statutory authority is exceptionally broad. Although the cases do not deal directly with the narrower point presented here—whether the NRC's ordering authority under section 161 deals with nonlicensees—there are no cases directly on that point.

As for *Reynolds* v. *United States,* 286 F.2d 433 (9th Cir. 1960), cited by some commenters as directly in conflict with the NRC's position, that case in fact does not undercut the NRC's position that it may exercise jurisdiction over unlicensed entities. As the Supplementary Information discussion points out, the issue in *Reynolds* was whether section 161 applied to the activities of the Commission itself. In discussing this issue, the court contrasted the activities of the Commission to the activities of *private industry* or licensees, and concluded that "[activities] authorized pursuant to this Act", to which section 161i refers, are "those activities of *private industry* authorized by the Atomic Energy Commission" pursuant to the various provisions of the Act. 236 F.2d at 438 (emphasis in original). The holding in *Reynolds* is not that section 161i applies only to licensees; the holding is that section 161i does not apply to the Commission's own activities. Accordingly, *Reynolds* does not stand for the proposition that the Commission lacks jurisdiction over any person who engages in conduct within the Commission's subject matter jurisdiction unless that person is licensed.

Reynolds involved the validity of a regulation issued by the Commission to bar U.S. citizens from entering a 390,000 square mile "danger area" surrounding testing grounds being used by the Atomic Energy Commission to conduct nuclear tests. The regulation was purportedly issued under section 161i, and violation of the regulation was a felony, pursuant to section 223. In deciding whether the trespass regulation was authorized, the court focused on the purpose of the 1954 Act—"to provide for increased private participation in the atomic energy program * * *." 286 F.2d at 436. The court repeatedly noted that the 1954 Act provides in numerous sections that "private parties shall be subject to safety and security regulations enacted by the Commission", *id.* at 438; that the 1954 Act gives the Commission power to "authorize private industry" to participate in the development of peaceful uses of atomic energy, *id.* at 435; and that section 161i was "designed to allow Commission regulation of that private activity." *Id.* at 441. While the court tended to use "private parties" and "licensees" somewhat interchangeably, the words are *dicta* in terms of the holding of the case, namely, that section 161i does not apply to the Commission's own activities.

Moreover, the court in *Reynolds* was influenced by the fact that in 1956, two years after the enactment of section 161i, Congress enacted an amendment granting the Commission power to deal with trespasses, accompanied by a Congressional statement that the Commission did not previously have such authority. Congress provided that violation of this regulation was a misdemeanor. While the Commission argued that the 1956 amendment was intended to deal only with simple trespass while the regulation promulgated under section 161i dealt with trepass involving dangers to health or security, the court rejected this argument, reasoning that section 161i was designed to allow Commission regulation of private participation in the nation's atomic energy program, and not to permit regulation of the Commission's own activities. Consistent with *Reynolds,* therefore, the amendments here promulgated focus on the regulation of private industry.

As for the FCC cases cited in the Supplementary Information in support of the proposition that the FCC's ordering authority is necessarily broad, the commenters do not dispute the Commission's statement that the FCC's enabling statute is analogous to section 161i(3). Rather, since several of the cited decisions concern the FCC's rulemaking and ordering authority with regard to its licensees, as opposed to unlicensed persons, the commenters would dismiss their relevance. This conclusion is misplaced; the cases support the general principle for which they are cited. Moreover, one of the cases, *United States* v. *Southwestern Cable,* 392 U.S. 157 (1968), specifically deals with agency ordering authority over unlicensed entities.

In *Southwestern Cable,* it was held that the FCC's ordering authority under section 154i of the Federal Communications Act, an enabling statute which in many ways is analogous to the 1954 Act, extended to unlicensed persons if those persons were engaged in activity that fell within the FCC's subject matter jurisdiction. The Court found that the FCC was authorized to issue an order to a CATV system to stop activities having adverse effects on FCC licensees, even though the FCC did not require CATV systems to be licensed. The court reasoned that, in the absence of compelling evidence that Congress intended otherwise, administrative action imperative for an agency's ultimate purposes should not be prohibited.

The commenters attempt to distinguish *Southwestern Cable* on the grounds that the activity involved in that case did not require a license, while in the NRC's case the conduct of the individual is directly related to an activity which clearly is subject to NRC licensing under the Act. In contrast to the belief of the commenters, this distinction argues in favor of the NRC position, and not against it, since the activity at issue here is subject to

licensing, a more rigorous form of regulation than that envisioned by the FCC. In *Southwestern Cable,* the unlicensed CATV system which the Supreme Court found subject to FCC regulatory authority had not violated any statutory provision or regulatory requirement.

The commenters also noted that in *Southwestern Cable,* the Court upheld regulatory authority over the then new communications technology of CATV, while the NRC is seeking direct regulatory authority over established industry participants who have been in existence since the industry began. However, upon analysis, the link between such unlicensed participants engaged in an area subject to the NRC's regulatory authority is more direct than the link between the FCC's statute and an industry not even in existence at the time of the enactment of that statute. The commenters err in stating that these unlicensed persons would "suddenly" be subject to direct regulatory enforcement authority; these persons have always been subject to direct enforcement authority under the statute, although the NRC has not, until now, seen the need to exercise that authority through implementing regulations. Moreover, these persons have always been subject to indirect regulatory enforcement, since the Commission has exercised its authority over licensees by issuing orders that may have an immediate adverse impact on unlicensed individuals. The Commission believes that it will be more effective to exercise its statutory authority to protect public health and safety by direct means rather than indirect means.

Comment: Section 206 of the Energy Reorganization Act of 1974, as amended, (the 1974 Act) subjects to NRC regulation the conduct of unlicensed persons engaged in specifically-defined activities that do not require a license. Section 206(a) is specifically limited to directors and officers of NRC licensees and of vendors, contractors, and suppliers, and not to all individual employees of those persons. In the view of the commenters, this represents an expansion of NRC jurisdiction beyond the authority conferred in the 1954 Act; section 206 would have been unnecessary if the NRC's then existing authority included the authority to "demand" information from and penalize the directors and responsible officers of contractors and vendors of licenses. Moreover, in the discussion accompanying the promulgation of a 1983 amendment to part 2, the Commission stated that, "[i]n general, the Commission's regulatory authority is limited to NRC licensees or persons who are required to obtain a license * * *."

Similarly, section 210 of the 1974 Act, the "whistleblower" protection statute, authorizes the NRC to regulate the conduct of unlicensed employees engaged in specified activities. Section 210 would not have been necessary had the NRC already possessed authority to issue orders to any person engaged in an activity that could affect nuclear safety. Therefore, with the enactment of sections 206 and 210 of the Energy Reorganization Act, the Congress extended the Commission's authority to include nonlicensees as well as licensees, but only in these specifically delineated circumstances.

Response: The Commission views section 206 as a mandate to the AEC to exercise its authority to require reporting of safety defects, and not an expansion of existing authority. There is only one sentence on the purpose of section 206 in the Conference Report: "Generally [section 206] is directed toward assuring that the Commission has prompt information concerning defects in major components of facilities subject to licensing which would create a substantial safety hazard." H.R. Rep. No. 1445, 93 Cong., 2d Sess. 37 (1974), U.S. Code Cong. & Admin. News 1974, p. 5550. Section 206 was enacted by the Congress in response to an increase in safety defects, to emphasize the need for prompt identification of deficiencies at all levels of facility construction, including components supplied by vendors. Citing the fact that component failures accounted for more than half of the abnormal occurrences reported to the AEC in 1973, the Congress determined to provide, specifically, for the reporting of safety defects and noncompliance. Section 206 emphasizes the importance of prompt reporting. This section should not be read as an extension of AEC authority, but rather as a mandate by the Congress that the AEC must exercise its authority to compel prompt reporting by both licensees and vendors. By including the provisions in section 206, the Congress intended to "upgrade the system of detecting and anticipating the defects that increasingly have plagued" the industry. S. Rep. No. 93–980, 93 Cong., 2d Sess. 67 (1974), U.S. Code Cong. & Admin. News 1974, p. 5528. The Commission reads the statement in the Senate Committee Report that there is no "similiar provision" in the 1954 Act as just that—*i.e.,* there is no similar provision specifically requiring such reporting—and not as a statement that there is no authority in the 1954 Act to require such reporting. Section 206(a) limits the civil penalty liability of individuals to individual directors and responsible officers of firms who knowingly or consciously fail to report as required, and does not otherwise address the NRC's enforcement authority.

Evidence that Congress did not expand the NRC's jurisdiction when it enacted section 206 is found in section 206(c), which requires the posting of that section's reporting requirements on the premises of any facility "licensed or otherwise regulated pursuant to the Atomic Energy Act of 1954, as amended." Surely, Congress did not intend to exempt vendors from this requirement, since the section was aimed at notification by vendors of defects. Thus, section 206, itself reflects the congressional view that vendors are subject to Atomic Energy Act jurisdiction and rebuts the commenters' argument that section 206 expanded NRC's jurisdiction. Consistent with section 206(c), the Commission, in 10 CFR part 21, has interpreted this posting requirement to include vendors. See 10 CFR 21.2, 21.6. Almost without exception, since the part 21 regulations were first imposed, vendors have complied with the posting requirements of § 21.6 by posting on their premises copies of the documents specified in that section.

Even if one were to view section 206 as a Congressional extension of Commission authority, it does not follow that the Commission's authority prior to the enactment of section 206 was limited to licensees, as the commenters argue. The 1954 Act, in its broadest sense, authorized the creation of a civilian nuclear power industry, and conferred uniquely broad and flexible authority on the Commission in order to carry out the purposes of the 1954 Act. As discussed above (in response to the comment concerning the statutory basis to support the issuance of orders to unlicensed entities), the provisions of sections 161b and 161i of the 1954 Act authorize the Commission to issue orders and otherwise regulate persons based on their involvement in specified activities; this authority is not based on whether such persons hold licenses. Similarly, section 161o authorizes the Commission to require such reports "as may be necessary to effectuate the purposes of this Act", again not limiting the Commission's jurisdiction to a particular class of persons.

Sections 206 (c) and (d) also grant the NRC authority to require contractors and vendors to post the notices required by section 206 and to conduct "inspections and other enforcement

activities" as needed to ensure compliance with section 206. Prior to the enactment of section 206, the Commission's inspection of contractors and vendors was conducted under authority derived from the licensee; AEC would request the licensee to instruct its vendor to permit Commission inspectors to enter the vendor premises and inspect. The legislative history of section 206 is sparse, but the commenters argue (supported by their view of *Reynolds* v. *U.S.*) that because the 1954 Act does not grant any authority over contractors and vendors as such, inspection of vendor records or premises could not assist the Commission in exercising any statutory authority and is therefore not authorized. This view is inconsistent with the broad authority provided by the Act in sections 161 b, i, and o, as described above, since it has always been recognized that licensees in many areas must rely on vendors and contractors whose actions can impact on the public health and safety. However, if the 1954 Act were to be read with the suggested limitation, it would still have no impact on the 1954 Act's ability to regulate individuals engaging in "hands on" activities at a facility or who are direct participants in an activity subject to NRC licensing authority (e.g., industrial use, medical use), since the 1954 Act contains a broad grant of authority over "any activity" authorized pursuant to that statute.

In conclusion, even if one were to determine that section 206 conferred new reporting authority over individual officers and directors of vendors and their firms, it should not be inferred that authority under section 161 was lacking over other individuals engaged in activities subject to the Commission's jurisdiction, such as employees of licensees and anyone performing services at a licensee site. Rather, if section 206 is viewed as an extension of jurisdiction, it should be viewed at most as an extension to include reporting by contractors and vendors. To view section 206 as suggested by the commenters would lead to an incongruous result: individual officers and directors of private, commercial business (i.e., vendors and contractors) who may only be tangentially involved in licensed activities, could be held personally liable for their actions, while individuals employed full-time by entities engaged in licensed activities (e.g., a medical technician who covers up a serious overdose of radioactive material to a patient) would be beyond the reach of the Commission.

As for the Commission's 1983 statement when it amended its regulations to enable it to issue a notice of violation to any person subject to the jurisdiction of the Commission, that "[i]n general, the Commission's regulatory authority is limited to NRC licensees or persons who are required to obtain a license * * *", the Commission stated clearly at that time that its legal authority extended to non-licensees. The Commission went on to note that "person" is broadly defined in 10 CFR 2.4(o), that the Commission's authority to issue notices of violation to non-licensees is not limited to section 206 of the Energy Reorganization Act and part 21, and that the Commission would issue notices of violation against non-licensees "in appropriate cases when requirements directly imposed upon non-licensees are violated." The rule on deliberate misconduct directly imposes requirements on non-licensees, and the Commission may issue notices of violation to, or take other appropriate enforcement action against, non-licensees for violation of those requirements.

Section 210 of the 1974 Act authorizes the employees of NRC licensees and applicants, and of their contractors and subcontractors, to take their grievances to the Secretary of Labor in instances where they feel they have been retaliated against for raising safety concerns. The Senate floor manager of the 1974 Act explicitly warned against drawing any inference from the new legislation that the Commission previously lacked authority to investigate alleged acts of discrimination or to take appropriate action. In urging his colleagues to accept the amendment, he said that

> * * * While new Section 210 of the Energy Reorganization Act of 1978 provides the Department of Labor with new authority to investigate an alleged act of discrimination in this context and to afford a remedy should the allegation prove true, it is not intended to in any way abridge the Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new Section 210 need not delay any action by the Commission to carry out the purposes of the Atomic Energy Act of 1954.

124 Cong. Rec. S15318 (daily ed. Sept. 18, 1978) (remarks of Senator Hart). These remarks refute the argument that Congress passed section 210 because it thought the Commission lacked investigatory authority.

Comment: Section 234 of the 1954 Act, cited in the Supplementary Information discussion for the proposed rule, does not provide support for the NRC's jurisdiction to issue orders directly to unlicensed individuals.

Response: As stated in the Supplementary Information, the proposed changes concerning willful misconduct are made under the authority of sections 161b and i and the licensing provisions enumerated in section 234a. Section 234 itself is not relied on as conferring jurisdiction to issue orders.

Comment: Two commenters expressed concern over the Commission's intention to exercise jurisdiction over an entity that held a license or was otherwise engaged in licensed activities at the time of the conduct in question, but that no longer holds a license or is so engaged. One commenter felt the Commission lacked such jurisdiction if the entity was no longer "actively connected" with the site and had not indicated an intent to continue using licensed materials, and that trying to reach such entities went beyond doing what is "necessary" to protect health to what is merely desirable. This commenter also felt that *Southwestern Cable* provides no support for the NRC position because that case involved companies actively engaged in activities, rather than persons no longer so engaged. The other commenter was concerned with the potential for abuse due to a lack of a time frame or criteria for such action.

Response: Section 161i provides broad authority to issue orders as the Commission deems necessary to govern any activity authorized pursuant to the Act. A person who is no longer engaged in licensed activities is not beyond the reach of the NRC's jurisdiction concerning conduct engaged in while that person held a license, simply due to, for example, the passage of time, the fact that the person no longer holds a license, or the fact that the person has abandoned the site. Accountability for acting in accordance with a license or Commission requirements in effect during the period of a license does not disappear upon expiration or termination of that license and the Commission's authority extends to such persons when necessary or appropriate to protect the public health and safety. See, *e.g.*, *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI–79–6, 9 NRC 673 (1979). The issues of retroactivity of regulations promulgated after the expiration of a license is not addressed in this rule.

Southwestern Cable does not turn on the timing of the activity in which the entities were engaged; it is the adverse effect on the regulated activity that gave rise to the FCC's assertion of jurisdiction. Arguably, an adverse effect can be equally severe when the activity has been engaged in some time in the past. If an activity (e.g. CATV) that does not require licensing is subject to regulatory authority, *a fortiori* an activity covered by a license that has subsequently expired (i.e., former NRC licensees) is subject to regulatory authority for matters arising out of activity engaged in during the period of the license.

In exercising its authority in this area, the Commission intends to apply a rule of reason and to concentrate on matters of potential significance.

Comment: With regard to willful misconduct that does not involve an actual violation of NRC rules, but that causes the NRC to lose reasonable assurance, several commenters were concerned that the provision is too broad in scope and needs further definition to avoid an unacceptable level of uncertainty as to the enforcement process. Others stated that there is no basis for taking enforcement action against anyone for conduct that does not violate a specific regulation or other law, questioning how such conduct can be improper in any way.

Response: The Commission has redrafted the rule to delineate with specificity both the kinds of persons who are encompassed by the rule (i.e., a licensee, an employee of a licensee, and other specified persons and their employees who knowingly provide "components, equipment, materials, or other goods or services that relate to a licensee's activities subject to this part") and the kind of conduct that would subject that person to enforcement action (deliberate misconduct, or deliberate submission of materially incomplete or inaccurate information).

These changes in the final rule were made to make clear that the person who is subject to this rule must have reasonable knowledge that his or her actions are related in some manner to an activity subject to NRC regulations. In situations involving deliberate misconduct, enforcement action is limited to cases where the person either deliberately engages in conduct that causes a violation by a licensee or that, but for detection, would have caused a violation by a licensee. If a person with the requisite knowledge intentionally acts in a way that causes, or that, but for detection, would have caused, a licensee to be in violation of an NRC requirement, that person is now on notice that he or she may be subject to individual enforcement action. Similarly, if a person with the requisite knowledge deliberately provides false information to the NRC, a licensee, or a contractor or subcontractor of the same, that person is on notice that he or she may be subject to enforcement action, according to the terms of the regulation.

In the above cases, the person knows he or she is acting in an area that relates to a licensee's activities subject to NRC regulations. For situations that do not actually result in a violation by a licensee, anyone with the requisite knowledge who engages in deliberate misconduct as defined in the rule has the requisite intent to act in a manner that falls within the NRC's area of regulatory concern. The fact that the action may have been intercepted or corrected prior to the occurrence of an actual violation has no bearing on whether, from a health and safety standpoint, that person should be involved in nuclear activities. Similarly, a person with the requisite knowledge who deliberately provides false or inaccurate information that is material to the NRC presents a health and safety concern within the NRC's regulatory sphere.

The modifications, as described above, to the final rule have been made to alleviate concerns over the rule's scope. To further alleviate concerns, examples of specific situations covered by the rule are set forth in the statement of considerations. The situations that are not covered by the final rule will continue to be subject to enforcement action against licensees that may impact the individual.

Comment: Several commenters expressed the view that the absence of hearing rights to recipients of "Demands to Show Cause", and to the interested public, is a denial of due process. Many felt that a Demand to Show Cause is not preliminary to, but part of, an enforcement proceeding, and to characterize it as preliminary is misleading; it both alleges violations or wrongdoing, and it requires admissions and denials under oath. Adoption of the proposed rule, as it relates to a Demand to Show Cause, would create a situation wherein the potential exercise of the NRC's authority is without reasonable bounds, contrary to law and in violation of constitutionally protected rights.

Response: The Commission believes that this viewpoint results from a misunderstanding of the nature of a Demand to Show Cause. A Demand to Show Cause is preliminary in the sense that the Commission only is requiring information in order to determine whether enforcement action against the subject of the Demand is warranted. However, the Commission has decided to address this concern in its final rule by deleting the use of the term Demand to Show Cause, which several commenters appear to have confused with an Order to Show Cause, and using instead a Demand for Information, a pre-enforcement document which the Commission has been utilizing for several years. With respect to unlicensed persons, the final rule provides that a response to a Demand for Information is not required of the person to whom it has been issued. With these modifications, the final rule should not give rise to the same expressions of constitutional concern.

Accordingly, in situations where the Commission seeks information in a pre-enforcement context, the Commission has decided to codify in § 2.204 of the final rule the use of a "Demand for Information." The Commission routinely has issued Demands for Information to licensees in order to determine whether to initiate an enforcement action. The use of these documents has not given rise to expressions of due process concerns. As with the proposed rule, the purpose of the Demand for Information is to gather information that can be evaluated before the Commission determines whether it must take action against an individual or other entity. The Demand for Information will set forth the basis for the need for information, and will require, as to licensees only, an answer that "specifically admit[s] or den[ies] each allegation or charge made * * *." A nonlicensee who receives a Demand for Information will be given the opportunity, should the nonlicensee choose not to respond, to tell the NRC why it believes a response is inappropriate and why the Demand should not have been issued. The use of this document is intended to provide an opportunity for the recipient to set forth any information it wishes to bring to the attention of the Commission in advance of a possible enforcement proceeding.

While Section 189 of the Act provides for the granting of a hearing in connection with proceedings to modify, suspend or revoke a license, neither the 1954 Act nor the Administrative Procedure Act requires a hearing in connection with a document which requires only the submission of information. The final rule, as revised, does not eliminate any hearing rights afforded under the statutory provisions of the 1954 Act; rather, it continues those rights. See § 2.202 (a)(3). Once the NRC has made a decision that it is necessary to take action against an entity, an

opportunity for hearing is provided to challenge the action and, except when required for public health and safety reasons or if the violation is willful, that hearing precedes the effectiveness of the order. See § 2.202 (a)(5).

2. Privacy Act Considerations

Comment: Two commenters suggested that collection, maintenance, and distribution of the names of unlicensed persons subject to NRC enforcement orders would be inconsistent with the NRC's other statutory obligations, like the Privacy Act, but did not expound further.

Response: While the Commission stated in the Statement of Considerations accompanying the proposed rule that the Commission intended to distribute periodically a compilation of orders issued under the rule, distribution of such a document is not part of this rulemaking. However, the Commission has decided to address the comments relating to a "list" herein.

The Privacy Act, 5 U.S.C. 552a, was enacted to protect individuals against unwarranted invasions of their privacy stemming from Federal agencies' collection, maintenance, use, and disclosure of personal information about them. Further, "the Privacy Act governs the responsibilities of federal agencies in the disclosure of, access to, and content of their records concerning individuals." *BBCA, Inc.* v. *United States,* 630 F. Supp. 349, 348 (D. Minn. 1986); see also 5 U.S.C. 552a(b).

For purposes of the Privacy Act, in analyzing the issue of whether information may be collected, the initial consideration is whether the information is of the type that an agency may maintain under a system of records. Under the Privacy Act, a system of records is to be maintained with only that "information about an individual [which] is relevant and necessary to accomplish a purpose of the agency [that] is required to be accomplished by statute or Executive order of the President." 5 U.S.C. 552a(e)(1). The statute under which the NRC derives its authority in this case is the 1954 Act.

As set forth above, sections 161b and 161i of the 1954 Act provide broad ordering authority and, as relevant here, section 161o authorizes the Commission to order reports as may be necessary to effectuate the purposes of that Act. Maintenance of a Privacy Act system of records containing the names of individuals subject to NRC enforcement orders is relevant and necessary to accomplish the purposes of the 1954 Act. Therefore, the new NRC regulations are in accord with the requirements of the Privacy Act.

The Privacy Act also requires an agency that maintains a system of records to ensure that all records used by the agency in making any determination about an individual be maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination. 5 U.S.C. 552a(e)(5); see also S. Rep. No. 93–1183 and H. Rep. No. 93–1416, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6917; *National Treasury Employees Union* v. *IRS,* 601 F. Supp. 1268 (D.D.C. 1985).

Maintaining a list of individuals to whom orders have been issued will comply with these requirements. The NRC's new regulations provide for a full range of due process guarantees associated with an order being issued against an unlicensed person. Specifically, the unlicensed person would be provided the same type of adjudication process that is currently provided, under the 1954 Act, for licensees. See 10 CFR 2.202(a)(3).

The Privacy Act does not prohibit the creation of a list; it simply mandates that if a list is created, it will be done under certain strict rules and will provide a great measure of protection for the individuals subject to it by providing the individual greater control over the gathering, disclosure and accuracy of information collected about him or her. See *Parks* v. *IRS,* 618 F.2d 677 (10th Cir. 1980); *Miller* v. *U.S.,* 630 F. Supp. 347 (E.D.N.Y. 1986). It does this by affording the individual the means of ascertaining and ensuring that the agency's records contained within a system of records are proper and accurate. The individual has a right of access to the information compiled by the agency and to seek correction of inaccuracies contained therein. See 5 U.S.C. 552a(d)(2).

As is currently the procedure for licensees subject to an enforcement order, an order against an unlicensed individual will be published in the **Federal Register** and be the subject of a press release. See 10 CFR part 2, subpart B. Further, it is not until the order has been issued and the individual has been afforded an opportunity for a hearing, that the order issued against him or her, and his or her name, is to be included in the compilation to be distributed. Delaying the inclusion of the order in the listing will allow an independent review of the staff's action. This will be the practice even in the case of immediately effective orders. This compilation will include only those individuals who are currently the subject of an enforcement order. Therefore, as the alleged wrongdoer will be afforded notice and an opportunity to clear his or her name under the new regulations, there will be no violation of the Privacy Act's requirement of ensuring that the information in the system of records is accurate. See *Board of Regents* v. *Roth,* 408 U.S. 564 (1972). Following the hearing, the order against the individual would be included in the compilation pending the outcome of any appeal.

The Privacy Act requires that prior to information being compiled or disclosed by an agency, a system of records and the routine uses for which the information will be disclosed must be published in the **Federal Register**, in accordance with 5 U.S.C. 552a(e)(4)(D) and (e)(11). Further, the Privacy Act requires that a routine use not only be compatible with, but also related to, the purpose for which the record is to be maintained. See Privacy Act Guidelines, 40 FR 28953 (July 9, 1975); 5 U.S.C. 552a(a)(7).

Although implementation of the NRC's new regulations contemplates the circulation of a compilation of orders issued to unlicensed individuals subject to an NRC enforcement order (accompanied by a list of the affected individuals), the Commission will, prior to distributing the compilation, comply with the requirements of the Privacy Act. The NRC will establish and publish in the **Federal Register** notice of its new system of records and the intended use of the information in the system. The notice will indicate that all individuals who have enforcement orders issued against them will be the subject of the system of records and a routine use of these records will be the circulation of the compilation and list of those persons. One purpose for maintaining a list of individuals who have deliberately violated an NRC rule or regulation is to ensure that the industry is aware of the actions of persons working in the nuclear field. Therefore, the routine use is compatible with the NRC's reason for maintaining the information.

Comment: Four commenters expressed apprehension over the collection, maintenance, and distribution of the names of unlicensed persons subject to NRC enforcement orders, suggesting that it would be tantamount to the creation of a "blacklist" and was subject to numerous legal infirmities. These commenters did not indicate the precise nature of the perceived legal impediments.

Response: In order to respond to concerns about potential blacklisting, it may be helpful to consider what is considered objectionable about blacklists. Generally, the most

distasteful aspect of a blacklist is its secrecy and, often, the arbitrariness with which one may have been included on this type of list. Moreover, individuals on the list may not be aware that they are on it, and thus, they are not able to challenge their inclusion on the list.

In reviewing the legislative history of the Privacy Act, as well as case law on the subject of blacklisting, it is clear that Congress included section 552a(b) of the Privacy Act, which prohibits the disclosure of personal data or records, to halt the blacklisting of persons who did not comply with organizational norms. See S. Rep. No. 1183, 93d Cong., 2nd Sess. 6966 (1974). The few court cases that have dealt with the interpretation of the term "blacklisting" in the Federal arena have dealt with compiling and circulating a listing of persons who do not participate in savings bond drives or charity campaigns and the listing of results of employee tests or performance. These lists have been held to violate the Privacy Act because disclosure of the information was not needed by the agency in the regular performance of its work and neither was it a subject of the agency's routine uses. See *Parks* v. *IRS, supra* (IRS personnel files of employees who had not pledged to purchase government savings bonds were supplied for the purpose of a telephone campaign for the purpose of soliciting their purchase of bonds.)

The purpose of the compilation of orders to be distributed by the NRC is distinguishable from those cases and the meaning given the term "blacklisting" by Congress and the courts. First, a routine NRC use will be the listing and subsequent circulation of the names of individuals who have engaged in deliberate misconduct, or deliberately submitted incomplete or inaccurate information, as provided in the rule. Second, as described in the **Federal Register** notice, this use would provide persons in the nuclear industry with the names of individuals who have been subject to enforcement action under the rule.

It is recognized that these individuals may find it difficult to obtain employment in the nuclear industry. However, the Commission does not believe, nor is there any indication, that the compiling and circulating of a list of unlicensed individuals subject to public NRC orders published in the **Federal Register** would constitute an impermissible "blacklisting" of those persons. As stated above, the NRC's new regulations are in compliance with the Privacy Act and, further, the information to be compiled is being accomplished through the statutory powers enumerated in the Atomic Energy Act.

A regulation that is analogous to the NRC regulations is the listing of debarred government contractors under the Federal Acquisition Regulations, 48 CFR 9.404 *et seq.* Under these debarment regulations, the General Services Administration (GSA) compiles and distributes a list of contractors who have been debarred, suspended, proposed for debarment, or declared ineligible by an agency for participation in Federal government procurements, to all agencies and interested private individuals. These debarment procedures have been found to satisfy the requirements of due process as they afford contractors their full due process rights, including notice of the charges and a hearing. See *Old Dominion Dairy* v. *Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980); *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964). The listing of debarred contractors is distributed to protect the Government's interests. The fact that the GSA listing is not considered an improper method of providing information to the public on these ineligible contractors supports the principle that the NRC's list is not an improper way to inform the industry and to track the movement of individual wrongdoers in the nuclear field.

3. Other Comments Based on Legal Concerns

Comment: No real basis has been established to show that it is necessary to issue orders against unlicensed individuals or entities. Action against licensees for the actions of nonlicensed individuals or entities, while indirect, can have the same effect as the orders contemplated in the proposed rules. Moreover, there is no showing that repeat violations have occurred or are probable, and no evidence is cited to substantiate the suggestion that the proposed rules would deter the misconduct they address.

Response: As pointed out in the Supplementary Information accompanying the proposed rule, even if an unlicensed individual should be dismissed by a licensee or ordered removed by the NRC because of his wrongdoing, the wrongdoer may seek other employment in the same field at another facility. This may occur without the knowledge of the NRC or knowledge by the new employer of the employee's prior conduct. Existing regulations do not address this problem. In addition, willful acts of licensees' contractors, vendors, or their employees have caused licensees to be in violation of Commission requirements. Thus, additional enforcement options are needed to directly address these situations. As narrowed, the rule will now address these situations when they involve deliberate actions.

As for the possibility of repeat violations, in several instances the NRC has been faced with situations where wrongdoing by an unlicensed individual led to a conclusion, for reasons of public health and safety, that the individual should not be involved in licensed activities. However, even when the individual is barred from licensed activity for the licensee by whom he or she has been employed, and even when an information notice has been sent to all licensees so that they are aware of the individual's conduct, there is no enforceable prohibition on the individual himself or herself that would preclude his or her obtaining employment in licensed activities at another facility. In the absence of an order to that individual, there is no mechanism, short of issuing orders to every NRC licensee barring the individual's employment, to assure that the individual does not engage in licensed activities for a specified period of time. Without the ability to track the future employment of individual wrongdoers, potential health and safety problems may never be detected.

Comment: One commenter suggested that the NRC should consider whether the licensee should have notice and an opportunity to be heard concerning orders or demands issued to its employees or contractors. The possibility exists that an order or demand may be issued to a licensee employee or contractor without notice to the licensee.

Response: The NRC agrees that there are situations where it is appropriate to afford the licensee notice and opportunity to be heard. It is the intention of the staff, in the case of an order against a licensee's employee, to serve the licensee with a copy of such order and consider the licensee's comments. In the case of an order to a contractor, if the matter involves a particular licensee or licensees, the staff intends to serve the licensee(s). Where the order to a contractor involves issues of generic concern, the decision whether to serve licensee(s) will be made on a case by case basis. However, all such orders will be published in the **Federal Register.**

Comment: There seems to be no opportunity for a person whose name appears on a list of persons subject to an NRC enforcement order to defend

himself or herself prior to being placed on the list circulated by the NRC.

Response: Under both existing and proposed § 2.202(a)(3), a licensee or any other person adversely affected by an order has a right to demand a hearing. If a hearing is demanded, even in a case where the order is made immediately effective (prior to a hearing) because the Commission has found that the public health, safety, or interest so requires or if the violation is willful, it is the intention of the NRC to refrain from including an order concerning the individual in the circulated compilation of orders to individuals until the evidentiary hearing is concluded.

Comment: One commenter questioned the propriety of including proposed § 2.202(f), which requires the procedures of § 50.109 to be followed if the order involves a backfit. The commenter stated that, if an order was necessary to ensure adequate protection to the health and safety of the public, costs to the licensee should not be considered.

Response: The premise for issuing an order to remove an individual is that there is not reasonable protection to the public health and safety if that person is allowed to be involved in licensed activity. Section 50.109(a)(4)(ii) provides that a backfit analysis is not required when the regulatory action is necessary to ensure that the facility provides adequate protection to the health and safety of the public. In other cases, a backfit analysis may be necessary.

Comment: The term "subject to the jurisdiction of the Commission" is not clearly defined. A person accused of interference with required licensee performance should be tried in a court of proper civil or criminal jurisdiction and the NRC should not attempt to usurp the role of the courts.

Response: Under Federal statutes, the NRC has the responsibility to protect the public, the common defense and security, and the environment (collectively referred to here as public health and safety), from hazards that might arise from the material and facilities which it regulates. The enforcement program of the NRC is designed to fulfill these responsibilities by ensuring compliance with NRC requirements, obtaining prompt correction of violations and adverse conditions affecting safety, encouraging improvement of licensee performance, and deterring future violations. In contrast, criminal prosecutions for willful violations of NRC requirements are the responsibility of the Department of Justice (DOJ). Criminal prosecutions provide an additional tool to assure compliance and to deter future violations.

Enforcement actions within NRC authority include license revocations, suspensions and modifications, cease and desist orders, civil penalties, and notices of violation. The NRC has the authority to take such action as it deems necessary to protect the public health and safety, including the authority, when appropriate, to take immediate action. The DOJ has the responsibility to determine whether to institute criminal prosecution for willful violations of all Federal statutes, including the Atomic Energy Act of 1954, as amended. Thus, both the NRC and DOJ have authority and responsibility to take action for certain violations that may arise out of the same factual matters. Coordination of these matters is provided for in a Memorandum of Understanding between the NRC and DOJ. See 55 FR 50317 (December 14, 1988). In some cases, it may be appropriate for the NRC to stay its hand pending a criminal prosecution. In other cases, the public health and safety may require immediate NRC action that could impact a potential criminal prosecution. By acting to protect the public health and safety, the NRC is simply fulfilling its statutory mandate.

It should be remembered that when the NRC acts to protect the public health and safety by instituting a proceeding to modify, suspend, or revoke a license, hearing rights attach. In that way, the affected party receives the process to which it is due, and the NRC is not "usurping" the party's hearing rights.

Comment: The NRC is using the wrong evidentiary standard of "preponderance of the evidence" for determining whether wrongdoing has occurred such that an order should be issued against an individual. Citing *Inquiry Into Three Mile Island Unit 2 Leak Rate Data Falsification,* LBP–87–15, 25 N.R.C. 671 (1987), *aff'd,* CLI–88–2, 27 N.R.C. 535 (1988), the commenter believes that in cases against individuals, where findings can cause serious injuries to reputation, the evidence must be "clear and convincing".

Response: The preponderance of the evidence standard is the one customarily applied in Commission proceedings, including proceedings against individuals. It is the standard of proof prescribed in the legislative history of the Administrative Procedure Act (APA). *Steadman* v. *Securities and Exchange Com'n.,* 450 U.S. 91, *reh. denied,* 451 U.S. 933 (1981). It is the standard applied in cases brought under the APA, including, e.g., those proceedings where an agency seeks to remove a federal employee for misconduct. See, e.g., *Hale* v. *Dep't of Transportation, F.A.A.,* 722 F.2d 882, 885 (Fed. Cir. 1985).

In the *Leak Rate Data Falsification* case the Board departed from that standard because of the unique circumstances of that case. In determining that it would use the "clear and convincing" standard for some, but not all issues, the Board stated that it was doing so "as a matter of discretion." *Id.* at 691. The Board's decision to apply the "clear and convincing" standard to findings of manipulation and falsification was based not only on the fact that the findings were likely to have strong reputational impacts, but also on the fact that those findings involved the most serious memory difficulties in the proceeding due to the fact that the proceeding was conducted some 7 to 8 years after the incidents giving rise to the inquiry, due to circumstances beyond the Board's control.

As a result of this comment, the Enforcement Policy, which states that "An enforcement action (involving an individual) will normally be taken only when there is little doubt that the individual understood, or should have understood, his or her responsibility * * *." has been modified. The Policy now uses the term "satisfied" rather than "little doubt". The previous language may have implied an incorrect standard of proof expected before taking action. What is required is that the staff be satisfied that the individual fully understood or should have understood his or her responsibility.

Comment: One commenter questioned the statement in the Supplementary Information that "once the proposed (part 2) rules are in effect" there will be "procedural rules" governing the issuance of an order or demand to show cause, interpreting this to mean that additional procedural rules would then be developed.

Response: By this statement, the Commission was referring to the proposed rules which, when adopted, would then constitute the "procedural rules" referred to. At this time the Commission does not contemplate additional procedural rules to implement these changes.

Comment: The proposed changes to part 2 constitute a backfit under § 50.109 by imposing the "demand to show cause" process, and a backfit analysis is required.

Response: The proposed rule change is not a backfit, because it does not fall into the 10 CFR 50.109(a)(1) definition of a backfit, *i.e.,* it does not impose a change to a licensee's "systems, structures, components, or design, * * *

or design approval * * * or the procedures or organization * * *."

Moreover, the Backfit Rule has been interpreted by the Commission to not apply to administrative changes in NRC procedure, which is what is being modified here. Finally, the amended rule does not implicate any policy underlying the Backfit Rule.

The Backfit Rule was intended to address regulatory stability, that is, once the NRC granted regulatory approval to conduct an activity, the terms and conditions for conducting that activity would not be changed without cause. Rather than using a Demand to Show Cause, the final rule is codifying the use of a Demand for Information to which licensees have been subject for many years. As for the unlicensed individuals and entities subject to the rule change, no regulatory decision or approval is involved *per se*. Therefore, they have no interest protected by the Backfit Rule. Moreover, § 50.109 applies only to nuclear powerplant licensees, and not to anyone else. The commenter did not attempt to establish that it applies to non-licensed individuals or entities. In any event, an order would be issued under the rule to a person when integrity is lacking as a result of a deliberate violation such that there is no longer reasonable assurance that the licensee will comply with Commission requirements with that person involved in licensed activities. Such assurance is at the heart of the basis for the license. Therefore, these orders fall into the compliance exception to the backfit rule in 10 CFR 50.109(a)(4).

Comment: Two commenters raised the issue of Federal preemption. One feared that the NRC could prevent a person from practicing a State-licensed profession, and the other sought clarification that the rule would not preempt the States' reserved powers.

Response: The Commission is charged with responsibility for protecting the public health and safety within its jurisdiction, and to the extent that its actions preempt state regulatory actions, that is an integral and accepted part of the Federal system. See, *e.g.*, *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Com'n*, 461 U.S. 190 (1983). The NRC will not be prohibiting a person from practicing what is authorized by state license except to the extent that the person's actions involve issues of public health and safety in connection with NRC-licensed activities.

B. Policy Issues

1. Need for the Rules

Comment: The NRC has not demonstrated a need for the Demand to Show Cause; there is no suggestion that the Commission's current authority under 10 CFR 50.54(f) is unworkable or is not available as an enforcement tool to respond to actions by unlicensed individuals. Further, there is no guidance as to how the provisions of § 50.54(f) would be reconciled with proposed § 2.204.

Response: As stated in § 50.54(f), that rule pertains only to reactor licensees. While it is available to obtain information from those licensees, it cannot be used to elicit information from individuals or other entities that do not hold a license, or from the Commission's materials licensees. Moreover, while § 50.54(f) and a Demand for Information are essentially the same (as to licensees), a Demand for Information is normally preferred where enforcement action is contemplated for violations or deliberate misconduct.

Similar provisions for obtaining information from licensees exist in other parts of the Commission's regulations (e.g., § 30.32(b), § 40.31(b)). The Commission believes it is desirable to include in the regulations a single § 2.204, which can be used to get information from any person subject to the jurisdiction of the Commission, whether licensed or not, in order to determine whether an order should be issued.

Comment: There is no need for the willful misconduct rule. Some commenters see five cases per year as insufficient justification. Commenters also questioned the benefit to society, and the probability of success in preventing wrongdoing.

Response: As was pointed out in the Supplementary Information to the proposed rule, the number of cases expected to fall under these provisions is numerically small. However, they are significant matters, involving serious wrongdoing, and the Commission is concerned that they pose a distinct threat to the safety of the public. Under its mandate to protect the public health and safety, the Commission believes it appropriate to address these dangers, even if few in number.

While there can be no guarantee that a regulation will be effective in every instance, the Commission believes that this is the best available way to address the problems that have been identified in recent years and that expanding its options in the enforcement area will deter wrongdoing in some instances, which is a clear benefit to the public health and safety.

Comment: One commenter saw no need for the rule to apply to licensee employees.

Response: The examples referred to above involved employees of licensees, and it was those cases that demonstrated the need for more flexibility and led to proposing these rule changes.

Comment: There was no showing of why the criminal process is not satisfactory for dealing with problem individuals and, thus, the agency should continue to rely on the criminal process.

Response: The NRC refers cases that are suspected to involve criminal wrongdoing to the Department of Justice for consideration for prosecution. However, for a variety of reasons, the DOJ declines to prosecute many of the referred cases. In any event, the Commission has the responsibility to decide whether a wrongdoer should be sanctioned civilly and, in many cases, the Commission's responsibility to assure adequate protection of the public health and safety requires it to take certain action. Even in the few cases that are criminally prosecuted, it may be appropriate, for example, to limit the wrongdoer's involvement in licensed activities for a period of time, for example, concurrent with a period of probation. In other instances, there may be a long period before the criminal prosecution takes place, and NRC must take prompt action to limit immediate threats to public safety. Finally, it should be recognized that the civil and criminal standards of proof are different.

Comment: There is no basis for saying that unlicensed wrongdoers are moving about in the industry; there is no evidence that current practices in checking references are inadequate.

Response: There is clear evidence that many persons in the nuclear industry move from state to state. For example, partially in response to the mobility of physicians and other health care practitioners, the Congress mandated establishment of a National Practitioner Data Bank, which opened on September 1, 1990. Also, there is the Physician Disciplinary Data Bank operated by the Federation of State Medical Boards of the U.S. In the nuclear power industry, large numbers of outage workers regularly go from plant to plant. Representatives of organizations formed to create data banks of outage workers to expedite access authorizations have advised that present systems do not always reveal that an employee was terminated for cause and that reference checking is not always adequate.

Moreover, it is apparent that some individuals with specialized training do not intend to discard that effort and experience, and thus do seek to remain within their particular occupational field after dimissal or other disciplinary action for misconduct. Among recent cases, the NRC has found that some individual wrongdoers have gone from the employment by one licensee to another or sought similar employment within the industry. Licensees do not always provide future employers the reason for terminating employees. The Commission believes that effective deterrence of future threats to safety calls for knowing where these individuals are so that their employment in regulated activities can be closely monitored and, if they are held out of these activities for a period, knowing of their initial return. The orders contemplated under the deliberate misconduct rule address these concerns.

Comment: An individual's awareness that his or her misdeed would affect the employer's license and thus the livelihood of colleagues is a greater deterrent than possible NRC action.

Response: This awareness presumably exists in the workplace today, and is considered beneficial in the effort to have licensed activities conducted properly and safely. However, wrongdoing does occur. In the Commission's view, the threat of direct action against the individual as well as against the licensee employer should provide more effective deterrence.

2. Effect on Employment Relationships

Comment: The rule on willful misconduct will be a disincentive to employment in nuclear industries by creating additional stress on workers and undermining morale.

Response: The Commission is concerned with the potential for the perception that the comments raise. However, workers are presumed to desire to do their job properly. While enforcement action is, and will continue to be, taken against the licensee for violations of regulatory requirements, the rule does not apply in cases of negligence, honest mistake, or ignorance. As discussed above, the Commission expects to apply individual sanctions only in a very few significant or egregious cases. As the rule was originally proposed, it would be utilized only in those cases involving willfullness, defined by Commission policy as including deliberate actions and those violations resulting from careless disregard. In light of the comments received and further consideration of the desirable scope of the rule, the Commission has modified the rule to apply only to any person who engages in deliberate misconduct, or deliberately submits incomplete or inaccurate information, as provided in the rule. Under this narrower rule, the range of actions that would subject an individual to action by the Commission does not differ significantly from the range of actions that might subject the individual to criminal prosecution. Thus, there should be no disincentive to properly conscientious workers. If it does deter those who would intentionally cause a licensee to be in violation of regulatory requirements, then the rule achieves its purpose.

Comment: The proposed rule on willful misconduct would interfere with employer/employee relationships by undermining the authority of management and allowing the NRC to dictate employment relations. Discipline should be left to management.

Response: The current Enforcement Policy, 10 CFR part 2, appendix C, in section V. E., points out the close control over and limitations on when enforcement action will be taken against individuals. The Commission has no desire to infringe on employer/employee relationships and believes that the actions that it might take under the rule do not, in fact, interfere with those relationships any more than the existing practice of directing or confirming the removal of an employee found to have committed wrongdoing or in some way limiting his or her role in licensed activities with a given employer. Requiring a former employer who is called for a reference check to simply advise the prospective employer that the NRC has issued an order concerning the subject individual does not constitute interference with the employment relationship, as that relationship has already ended. For the vast majority of matters, discipline is left to management. The NRC will take action only in those relatively rare instances where the deliberate misconduct, or deliberate submission of incomplete or inaccurate information, raises concerns about the public health and safety, and this is the practice today.

3. Effect on Public and Private Expression

Comment: Two commenters thought that the proposed rule on willful misconduct would interfere with free speech, press, and assembly for those protesting NRC-licensed facilities.

Response: There is nothing in the proposed (or final) rule that even addresses, much less impinges upon, an individual's right to free speech, freedom of the press, or the right to peaceful assembly. The commenters did not provide any examples as to how in their view the rule might impact on these First Amendment rights.

4. Better Ways to Address the Problem

Comment: Full enforcement of existing rules for vendors who falsify records and supply fraudulent parts would better address the problem than the willful misconduct rule.

Response: There is currently no direct requirement as to vendors other than part 21, and that only requires reporting. This rule establishes specific requirements for persons such as vendors who engage in deliberate misconduct or who deliberately submit false information. With this rule, the Commission will be able to take action against vendors who recognize they are servicing nuclear activities and falsify records or supply fraudulent parts or certificates, when such actions are deliberate.

Comment: In access authorization procedures, the NRC should provide more guidance or promulgate requirements for background verification, or require disclosure of orders.

Response: These ideas, if adopted, would only affect reactor licensees, and not the many thousands of people employed by materials licensees, and also would not be adequate to address those persons, including corporations and partnerships, whose involvement in licensed activity must be prohibited or needs some measure of oversight or restriction. Finally, it would not permit the fine tuning that can be accomplished through individual orders.

Comment: Rather than issuing orders to individuals, all that is necessary to achieve the NRC's purpose is to distribute, to all licensees, a list of orders issued to licensees containing restrictions on the activities or employment of individuals.

Response: This is not sufficiently comprehensive to address the full spectrum of expected situations and would not necessarily preclude potentially dangerous persons from engaging in licensed activities. The intention of the Commission is to impose an obligation directly on the wrongdoer, and that can be accomplished only through an order directed to that person. Further, the cost and other problems associated with periodically distributing copies of orders to more than 8000 materials licensees and thousands of consultants would be substantial.

Comment: The rule should be modified to apply only to willful misconduct that significantly affects public health and safety.

Response: The Commission does not believe the rule should be narrowed as suggested. However, as described above, the rule has been narrowed to prohibit only deliberate misconduct. Deliberate misconduct, by itself, raises a significant public health and safety concern.

Comment: Three other suggestions were:

(1) Provide Federal trial before imposing penalties,

(2) Apply the willful misconduct rule only in cases in which the individual admits misconduct, and

(3) Set up a defendant support fund for counter-suing NRC officials.

Response: These suggestions are rejected for the following reasons, respectively:

(1) While there is no provision for a Federal trial, an administrative hearing may be requested. An administrative hearing may be held before or after the effective date of the action, depending on the circumstances. There is a right to appeal the administrative decision to a Federal court for its review.

(2) The rule would be easily thwarted if it only applied after an individual admitted the misconduct.

(3) This is not permitted under current law.

5. Method of Implementation

Comment: Under the proposed amendments to part 2, the right to issue orders and Demands to Show Cause would be extensively delegated, underscoring the potential for abuse.

Response: The purpose of delegating the authority to issue orders and demands, as was stated in the Supplementary Information, is to avoid the need to amend the regulations each time the title of one of the currently enumerated officials is changed. It is the intention of the Commission that the authority will continue to be delegated to essentially the same small group of senior officials enumerated in the current rule. These officials are also listed in the Enforcement Policy, under section VIII. In addition, as provided in the Enforcement Policy and noted in the next response, the staff will be consulting with the Commission before acting in many of these cases.

Comment: Some commenters expressed concern about widespread orders to unlicensed persons, the potential for abuse by NRC officials and inspectors, false accusations, and a general apprehension about judicious application of the willful misconduct rule.

Response: The Commission recognizes, as stated in the statement of considerations accompanying the proposed rule, that enforcement actions against individuals are significant actions that need to be closely controlled and judiciously applied. To this end, the staff will consult with the Commission before taking action directly against unlicensed individuals by order, unless the public health and safety requires immediate action, and will consult with the Commission before issuing a civil penalty against an unlicensed individual or a licensed reactor operator. However, as noted in Footnote 4 of the Enforcement Policy, civil penalties against individuals are not normally issued. Prior notice to the Commission will be given on Notices of Violation without civil penalties that are issued to unlicensed individuals and actions taken against other unlicensed persons such as corporations or partnerships.

Further, the rules provide an opportunity to answer any order issued, giving the subject person prompt input into the process. Subsequently, the person has the right to an administrative hearing and, if the person is still dissatisfied after the hearing, the matter may be taken to Federal court. Finally, there is an existing mechanism for handling complaints of improper NRC employee behavior, through requests to the NRC Inspector General for investigation.

Comment: The system envisioned by the NRC will not work because individuals will not reveal the existence of an order to prospective employers.

Response: The Commission recognizes that some individuals may not comply with the terms of an order, but believes that in many cases a lesson will have been learned, and the individual will thereafter comply with requirements. For those who do not, failure to comply with an order would be a basis for possible civil and criminal enforcement action and possibility of such action should increase the degree of compliance. In addition, licensees may be required to divulge the existence of the order during reference checks which will increase the likelihood that prospective employers will be aware of the issuance of the order.

Comment: There will be additional costs to employers, such as training and recordkeeping, in providing past employment information.

Response: The rule would only add a single fact to whatever information is normally given on any former employee who was subject to an order that is still in effect. This information should be in the individual's personnel file, so the burden should be very slight. Of the thousands of licensees, this rule would probably affect only a handful of licensees at any time. For personnel conducting reference checks prior to hiring, the burden amounts to no more than good business practice.

Comment: One commenter thought it was burdensome on the employer to require him or her to inform inquiring prospective employers of the existence of an order against the former employee for an indefinite period of time.

Response: The only burden on a former employer is to be aware of whether an employee or former employee is presently subject to an NRC order. Given the small number of orders anticipated, it should not pose an undue burden on any employer. As to an indefinite time, in most cases a specific time period will be provided in the order.

Comment: Two commenters questioned use of "attitude" of the individual as a factor in determining action to be taken.

Response: The Commission believes that in addressing the issue of future involvement of an individual in licensed activity, where safety is crucial, it is proper to consider the individual's attitude toward compliance with safety practices and regulations. Recognition and admission of past errors indicates a more positive attitude than continuing denial or hostility, and thus enhances the Commission's reasonable assurance that licensed activities will be conducted in a manner that protects public health and safety. However, "attitude" is only one factor and is not controlling in the overall determination of appropriate action.

Comment: Several commenters expressed concern that the rule on willful misconduct or some of the critical terms in its application are vague, overly broad, too subjective, or create uncertainty or ambiguity in the process. Two of these commenters maintained that the line between "careless disregard" and "negligence" is tenuous; one commenter equated the terms. A few commenters were concerned about the definition of "willful misconduct." One commenter considered the definition of licensed activity to be unworkably vague.

Response: While it is difficult to precisely define any of these terms, that is also true of simple negligence and other terms used regularly in the law. It has been held that careless disregard is willful, *Steinberg & Son* v. *Butz* 491 F.2d 988 (2d Cir. 1974), and the Enforcement Policy adopts the same standard. Willfulness does not include acts that do not rise to the level of careless disregard, e.g., violations caused by simple error, misjudgment,

miscalculation, ignorance, or confusion on the part of the individual. The use of these terms, that are already used in the enforcement program, should not create any uncertainty or ambiguity in the enforcement process. However, because the scope of the proposed rule has been narrowed to apply only to deliberate acts and not those resulting from careless disregard, these comments, to the extent that they apply to careless disregard, are no longer applicable.

Comment: "Willful misconduct" should be redefined to prevent sanctions for unknowing violations and "careless disregard" should be deleted as it may be subject to misinterpretation.

Response: Limiting the rule to situations of deliberate acts resolves these concerns.

Comment: The rule on deliberate misconduct fails to recognize the need to treat individuals differently from corporations and under different procedures.

Response: The proposed rule primarily addresses the conduct of individuals, but also of vendors. The Commission sees no need for different rules and believes that the procedures in place and as modified by the accompanying changes being made to 10 CFR Part 2, Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, are adequate.

Comment: A few commenters felt that a Demand to Show Cause should include a provision for objecting to the Demand on grounds of reasonableness or burdensomeness, should describe the material to be produced with such definiteness and certainty as to permit the material to be fairly identified, and should demonstrate the general relevance and scope of the information being sought. The respondent should be entitled to seek additional clarification and guidance. One commenter felt that the proposed rule should indicate that a person responding to a Demand to Show Cause may satisfy the demand by making the requested information available for inspection and copying, to avoid excessive and unnecessary burden to the responding party; it should also ensure that the time for response is a reasonable one.

Response: Traditionally the Commission staff maintains open lines of communication with recipients of Demands for Information, so that any needed clarification can be sought and obtained. To facilitate such communications, the staff intends to include in any Demand the name and telephone number of an NRC staff contact that the recipient may contact should he or she have any questions regarding the Demand.

Although the final rule provides that a substantive response by a non-licensee is not required, failure to respond may lead to issuance of an order that could only be challenged through a hearing request. If a non-licensee chooses not to provide a substantive response, the Commission expects that the non-licensee will respond by indicating why the information sought is not being provided and why the Demand should not have been issued.

Comment: The rule should provide for recovery of costs of an unlicensed entity for responding to a Demand to Show Cause when it has been determined that no violation has taken place.

Response: In meeting its regulatory responsibilities to protect the public health and safety, it is sometimes necessary to require information from, and impose obligations on, unlicensed persons. *See e.g.,* 10 CFR 21.2. It is not the practice of the NRC to provide reimbursement for costs in connection with fulfilling its regulatory functions. Moreover, as stated previously, a Demand for Information is an opportunity that is provided to an entity, prior to the institution of an enforcement proceeding, to present information to the Commission as to why the Commission should not initiate an enforcement proceeding. If an unlicensed entity chooses to not take advantage of this opportunity, a decision whether to initiate the enforcement proceeding will be made without the benefit of that input.

Comment: Three commenters were concerned with the length of time that an order would be in effect and sought additional information on how an individual could redeem himself or herself to avoid being listed "for life."

Response: As was explained in the Supplementary Information to the proposed rule: "Ordinarily, the Commission would expect to provide a specific time limit for the provisions of the order, and a process for relaxation of the order." Normally the term specified would not exceed five years. Even if an order were to appear to bar a person indefinitely, and failed to include the usual provision that the Regional Administrator could relax its provisions, the person could request modification by the NRC.

Comment: The proposed changes to the Enforcement Policy should be published for comment before publication of the final rule on misconduct.

Response: The Enforcement Policy is not a rule, but a statement of Commission policy. Policy statements are not as a matter of course published for comment before their effective date. At the time of publication of the revised Enforcement Policy, public comments on the changes are solicited. The Commission believes that the limited scope of the rules, combined with the statement of considerations published herewith and the views expressed in the statements of consideration for the proposed rule, provide adequate explanation and notice of the changes to the Enforcement Policy, which are intended simply to provide guidance on the implementation of the rules.

Comment: Appeal rights should be set out in the misconduct rule.

Response: The Commission's regulations have been organized so that standard procedural rules governing a number of Commission proceedings appear in one place. Such provisions appear in 10 CFR part 2, and include provisions concerning hearing and appeal rights. Section 2.700 of subpart G to part 2 is being amended at the same time as these final rules on issuance of orders and deliberate misconduct, so that the Commission's procedural rules of general applicability, as set forth in subpart G, are applicable to an adjudication initiated by an order under § 2.202. This subpart includes procedures for an appeal from an initial decision. Since the Commission's regulations have been organized so that the subpart G rules apply to a number of types of adjudications, there is no need to repeat these procedures in the substantive rule itself.

III. The New Regulations

After careful consideration of all the comments received, the Commission has modified the rules as proposed by (1) deleting the term "Demand to Show Cause", and codifying the use of a Demand for Information, while offering (but not requiring) non-licensees the opportunity to respond to such demands; (2) clarifying that an answer to a Demand for Information consenting to the entry of an order constitutes a waiver of hearing and certain other rights, (3) making the misconduct rule applicable to a portion of the spectrum of willful misconduct, namely deliberate actions, and not applying it to willful misconduct caused by careless disregard, and (4) deleting the last sentence of the proposed misconduct rule in each of the affected 10 CFR parts. This sentence addressed willful misconduct arising out of activities within the jurisdiction of the NRC and which places in question the NRC's reasonable assurance that licensed activities will be conducted in a manner that provides adequate protection to the public health and safety, but which does

not in itself result in a violation of NRC requirements. As noted in (3) above, the misconduct rule is now limited to deliberate misconduct, and the exact scope of the rule has been clarified. In its final form, it addresses deliberate misconduct by licensees and licensee employees, and by others who knowingly provide goods or services relating to a licensee's activities subject to NRC regulation, when that misconduct causes or, except for detection, would have caused a licensee to be in violation of an NRC requirement. In this context, it includes an intentional act or omission that the person knows would cause a licensee to be in violation of any rule or regulation or other NRC requirement, or that the person knows constitutes a violation of a requirement or policy of a licensee, contractor or subcontractor. It also addresses the deliberate submission to the NRC, a licensee, or a contractor, of information that the person knows to be incomplete or inaccurate in some respect material to the NRC. Other minor changes, of a purely editorial nature, also were made.

A. Revisions to Procedures to Issue Orders

The final rule revises § 2.202 to establish a mechanism to issue orders both as to a licensee and to any person subject to the jurisdiction of the Commission, when necessary to protect public health and safety or to minimize danger to life or property or to protect the common defense and security. Such a person includes, but is not limited to, a person who held a license or who was otherwise engaged in licensed activities at the time of the conduct in question, but who no longer holds a license or is so engaged.

In addition, the procedural mechanism for issuing Demands for Information to licensees and other persons is set forth in a separate section in order to make it clear that the right to a hearing does not attach at the time of issuance of a mere Demand for Information, i.e., a demand that a person or licensee provide the Commission with information that will be evaluated before the Commission determines whether to initiate an enforcement action.

Orders, including Orders to Show Cause, have been issued under section 161 of the Atomic Energy Act of 1954, as amended, as implemented by §§ 2.202 (order to show cause), and 2.204 (order for modification of license). In addition, civil penalty orders are issued under section 234, implemented by § 2.205 (civil penalties). In the past, NRC practice had been to issue a single order, an Order to Show Cause, which requires that certain information be provided to demonstrate why either a proposed or immediately effective action modifying, suspending, or revoking a license should not be taken. The order afforded a hearing with regard to these actions. While section 189 of the Atomic Energy Act provides for the granting of a hearing in connection with proceedings to modify, suspend, or revoke a license, neither the Atomic Energy Act nor the Administrative Procedure Act requires a hearing in connection with a Demand for Information that requires only the submission of information, but does not by its terms modify, suspend or revoke a license. More recently the staff has been using Demands for Information that seek information to determine whether an enforcement action should not be taken.

The 1954 Act does not explicitly set out the form or requirements for an Order to Show Cause or a Demand for Information. The 1954 Act does, however, authorize the Commission to collect information pursuant to sections 161 c and o, to carry out its responsibilities and the Commission may issue show cause orders or Demands for Information to implement this authority. Section 182 of the Act authorizes the Commission to request information from licensees and the Commission has implemented this authority by promulgating regulations such as 10 CFR 50.54(f). Licensees subject to Commission requests under 10 CFR 50.54(f) or its equivalent in other parts of the NRC's regulations have no hearing rights under the 1954 Act regarding these information requests.

Accordingly, to clarify that hearing rights do not attach to mere demands for the submission of information, the Commission is removing its provisions on Orders to Show Cause from the Commission's general ordering authority contained in § 2.202. To avoid any confusion with orders under revised § 2.202, the Commission is codifying the use of a document called a "Demand for Information", and provisions concerning these demands are set forth in a new § 2.204. Under the rule, as in the past, a Demand for Information will be issued only to require the submission of information. If a Demand for Information is issued as part of an order requiring action pursuant to § 2.202, hearing rights will be offered but only with respect to the provisions of the order requiring action. This revision to the regulations governing orders changes the rule in *Dairyland Power Cooperative*, LBP–80–26, 12 NRC 367, 370–72 (1980) and *Consumers Power Company*, CLI–73–38, 6 AEC 1082 (1973), by setting the point at which a "proceeding" begins for purposes of triggering the adjudicatory rights under section 189 of the Atomic Energy Act to the point of issuance of an order compelling a licensee or other person to take or refrain from certain actions rather than the point where the agency merely demands information to show why no action should be taken. The change in practice is consistent with the Commission's power to define the scope of its proceedings. See *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983).

In order to avoid unnecessary duplication in the regulations, the prior § 2.204, "Order for modification of license," is deleted from part 2, since procedures for modification of a license are included in the new § 2.202.

Section 2.202 provides that if the licensee or other person to whom an order is issued consents to its issuance, or the order confirms actions agreed to by the licensee or such other person, that consent or agreement constitutes a waiver by the licensee or such other person of a right to a hearing and any associated rights. These consent orders will be effective on issuance. This is not a departure from current Commission practice, but merely conforms the Commission's regulations to this practice. Section 2.202(d) also provides that the licensee's or other person's agreement to an order must be in writing. This provision is intended to minimize the possibility of issuance of a confirmatory order (i.e., an order intended to confirm and bind a licensee to its commitments to certain actions) which does not accurately reflect the agreement reached by the parties. Whether or not the licensee or other person consents to an order, other persons adversely affected by an order issued under § 2.202 to modify, suspend or revoke a license will be offered an opportunity for a hearing consistent with current practice and the authority of the Commission to define the scope of the proceeding on an enforcement order. See *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983). The Commission will continue to publish orders in the **Federal Register** in accordance with current practice.

The final rules consistently vest authority to issue orders in the Commission, leaving it to the Commission's internal authority to delegate such authority to others. This avoids the need to amend the regulations each time the title of one of the previously enumerated officials is changed, and removes the unnecessary limitation on the EDO's authority to issue orders only in emergency

situations. See section VIII of the Enforcement Policy.

The Commission is retaining, in new § 2.202(a)(5), a provision that, upon a finding that the public health, safety or interest so requires or that the violation is willful, the proposed action may be made immediately effective, pending further proceedings on the order. A similiar provision appears in the current § 2.202(f) and § 2.204. Relief from the requirements of an immediately effective order, on the other hand, may be sought under the relaxation provisions contained in that order, or by motion to the Atomic Safety and Licensing Board or the Presiding Officer if a hearing has been requested. In addition, the Commission has initiated a rulemaking to provide for expeditious consideration of challenges to orders that are made immediately effective. "Revisions to Procedures to Issue Orders: Challenges to Orders that are Made Immediately Effective," (55 FR 27645; July 5, 1990).

The final rule also continues, in § 2.202(e), the backfitting requirements of § 50.109 as to part 50 licensees, including the provision therein that when immediately effective action is required, the documented evaluation may follow, rather than precede, the regulatory action.

Finally, consistent with the changes to §§ 2.202 and 2.204, § 2.1 is amended to specify that the scope of part 2 includes the issuance of orders and demands for information to unlicensed persons; § 2.201 is amended to emphasize the discretionary aspect of enforcement such that a notice of violation may be issued in response to an alleged violation, to delete the provision for issuing a notice of violation prior to an order because the essence of a notice of violation is contained in an order or Demand for Information, to specify that a Demand for Information may be issued if an adequate reply is not received to a notice of violation, and to substitute "order" for "order to show cause;" § 2.700 is amended to specify that subpart G (Rules of General Applicability) applies to all adjudications initiated by an order; and the heading of part 2 is changed to reflect the fact that it covers the issuance of orders.

B. Deliberate Misconduct by Unlicensed Persons

This final rule addresses only deliberate misconduct that causes or, but for detection, would cause, a licensee to be in violation of a Commission requirement, and deliberate submission of materially incomplete or inaccurate information. The Commission is focusing on those acts that are the more serious and in which there is a greater and more obvious need for regulatory action in order to protect the health and safety of the public. This will reduce the number of instances in which these sanctions should be applied and will eliminate, for purposes of the rule, cases in which the conduct, e.g., negligence or careless disregard, is difficult to characterize and thus more often a matter of dispute.

Concerning the second change from the proposed rule, misconduct that is within NRC jurisdiction but does not cause a violation of requirements, in view of the comments expressing concern in this area and the fact that the NRC has in the past been presented with infrequent instances of such activity, that portion of the proposed rule has been deleted. Instead, the final rule contains a prohibition on deliberate misconduct by licensees, licensee employees, and others who knowingly provide goods or services that relate to a licensee's activities subject to NRC regulation, when that misconduct would have caused a violation, except for detection. This more limited provision reaches those individuals who deliberately set in motion events that would cause a violation if not otherwise checked. An individual acting in this manner has the requisite intent to act in a wrongful manner such that application of enforcement sanctions may be warranted. In addition, the final rule prohibits deliberate submission of information that the person knows to be incomplete or inaccurate in some respect material to the NRC.

Examples of application of the "but for detection" provision include: A disgruntled operator deliberately opens a valve that causes a release, but the supervisor detects it before a violation actually occurs; a radiographer, in a hurry and believing that no one is in the vicinity, sets up for a shot without surveying or posting the radiation area, but just before exposing the source a fellow employee arrives and corrects the situation; a worker falsifies an inspection record concerning manufacture of a component, but the falsification is caught by a QC inspector.

The focus on deliberate misconduct in the final rule should not be construed to condone other unacceptable conduct by a person that causes a violation. In cases involving non-deliberate conduct, action against the individual may be more appropriately handled within the licensee's remedial program. In those cases, the Commission will continue to take action if appropriate against the licensee. Cases addressed in this rulemaking are significant matters in which the NRC believes that deliberate misconduct has occurred.

The final rule requires that the person must knowingly supply or provide goods or services that relate to activity subject to NRC regulation. This does not mean that the person must be familiar with 10 CFR so that it would be a defense to a citation that the person did not know in fact that a particular regulation or requirement either generally or specifically was involved. The focus is on the word "relate." The person must know that the end use is nuclear and that there may be some safety nexus. The standard is the knowledge of the reasonable person engaged in the activity applying the facts known to the person.

For example, in the case of power reactors, the Commission would conclude that a person knows a product relates to NRC regulated activities if the equipment or service supplied or provided affects structural supports, control systems, electrical generation, steam supplies, fluid boundary and similar activities where a reasonable person would recognize that there is a potential for safety significance. Thus, a person providing such things as piping, electrical equipment, chemicals, computer services, consulting services, and welding services to be performed at or delivered to a nuclear power plant would meet the test. Clearly, if the purchase order is subject to part 21 or appendix B of part 50 a person supplying the product would be covered. On the other hand, a person providing piping or electrical equipment to a warehouse of a utility that has both nuclear and non-nuclear plants who has no indication that the purchase is for the nuclear plant or nuclear activity would not, without more information, have the required knowledge. Similarly, a person providing food service, secretarial supplies, or landscaping services to a nuclear plant is not covered by the rule because a reasonable person would recognize that those activities are not related to regulated activities. However, a person providing equipment commercial grade or for balance of plant would not be excused from compliance with this provision if adequate notice has been provided that the equipment is going to a nuclear plant.

Similarly, for materials suppliers, it is enough to meet the "knowingly" requirement if the person knows that the part in question is to be used in controlling a teletherapy device in radiation treatment, or knows that the product is a container for a sealed source of radioactive material or a container to ship that material. Other

examples include provision of consulting services that permit a company to obtain a license or performance of an audit that assists a licensee in managing its operations.

In these instances, a reasonable man, knowing where the product is going, would know that it relates to regulated activity. Specific knowledge of the license or 10 CFR is not required. What is required is knowledge that the activity for which the product is sold is an activity regulated by the NRC.

A situation in which it might be appropriate to issue an order to an unlicensed individual is the case of an employee of a licensee who deliberately causes that licensee to be in violation of Commission requirements. Examples of such a situation include: a radiographer deliberately fails to conduct surveys or lock the source after exposures; an auxiliary operator at a nuclear power plant deliberately falsifies log sheets to reflect checks that were not, in fact, performed; a nuclear medicine technologist, although he or she performs the daily constancy check of the dose calibrator on weekdays, deliberately does not bother with the check when doing procedures on weekends, when he or she uses an unchecked calibrator to prepare patient doses. As a result of that individual's action, the Commission might no longer have reasonable assurance that requirements necessary to protect the public health and safety would be followed if that individual were to continue to engage in activities within the Commission's jurisdiction.

Another example of a situation where an order to an individual might be appropriate is the case of an unlicensed individual who deliberately provides an inspector, investigator, or other NRC employee with inaccurate or incomplete information on a matter material to the Commission's regulatory responsibilities. Additional examples include a supervisor who discharges an employee for raising safety concerns, a company officer who directs employees to provide false information to the NRC, an employee who deliberately falsifies records of required information, an employee who deliberately defeats alarms that have safety significance, a person who deliberately submits false information to a power reactor licensee to demonstrate that a component has been manufactured to a QA program or has specified characteristics, and a person who deliberately submits false information to a power reactor licensee and as a result is granted unescorted access.

Other examples of potential application of the rule include companies that provide testing services and whose employees deliberately supply false data to a licensee in an effort to convince the licensee that the product meets 10 CFR part 50, appendix B; vendors whose deliberate false certification causes a licensee to acquire components that do not meet license requirements, such as the ASME code, where required; and companies that supply components or other items knowing that the certificates of compliance are false. In these cases, depending on the circumstances, an order might be issued to the contractor or vendor, prohibiting use of a service, product, or component in licensed activities, or to the employee who had deliberately committed the misconduct, prohibiting that employee's involvement in licensed activities.

Depending on the circumstances of these types of cases, it might be appropriate to issue an order to the person, which may be a corporation or individual, either prohibiting the person from being involved in NRC licensed activities, conditioning the person's involvement in those activities, or requiring the person to provide prior notice to the Commission before engaging in licensed activities in the future. The provision for prior notice will permit the Commission to evaluate whether it needs to issue an additional order to prohibit or condition the person's involvement in licensed activities or to determine whether increased inspection effort is needed. In addition, the order might require the person to inform future employers licensed by the Commission of the existence of the order. This would provide some assurance that, should the person be employed to perform licensed activities in the future, the new employer would be aware of the person's past conduct and ensure that appropriate oversight is in place. Some of these conditions have been used by the Commission in settlement of litigation in accordance with 10 CFR 2.203. *Edward Hines, Jr. Medical Center*, ALJ–88–2, 28 NRC 477 (1988), and *Finlay Testing Laboratories, Inc.*, LBP–88–17, 27 NRC 586 (1988).

As a supplement to an order to an individual, the Commission might also order the facility licensee to remove the individual from licensed activities. This would provide additional assurance that the individual is actually removed. If the licensee has already removed the wrongdoer, the NRC could issue an order to the licensee confirming the removal and requiring the licensee to notify the NRC if the licensee desires to use the individual in licensed activities in the future, and to provide the basis for doing so. These orders could also direct the licensee to advise any prospective employer conducting licensed activities, who inquires about the past employment of the wrongdoer, of the issuance and publication of the removing or confirming order. These latter requirements may be appropriate because, while the NRC has preferred not to be involved in licensees' employment decisions, it has become apparent that licensees need more complete background information about prospective employees to make better employment decisions. Often, checking previous employment can be thwarted because employers are reluctant to divulge to prospective employers any derogatory information about former employees, due to state laws and fear of tort liability. Similar restrictions have been adopted in a final rule of the Federal Railroad Administration (54 FR 42894; October 18, 1989).

In deciding when to issue an order to an unlicensed person rather than the licensee, the NRC recognizes that judgments will have to be made on a case by case basis. However, in making these decisions, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, e.g., personal or corporate gain.
5. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
6. The employer's response, e.g., disciplinary action taken.
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

The orders described above would be issued only for deliberate misconduct that bears on the person's ability to carry out health or safety-related responsibilities. In most cases, the order would require the person to divulge the existence of the order to a prospective employer or customer involved in licensed activities. Ordinarily, the Commission would expect to provide a specific time limit for the provisions of the order, and a process for relaxation

of the order. These orders will be subject to the procedures and hearing rights of 10 CFR part 2.

Issuance of the orders described above will have the benefit of making the NRC aware of the person's future involvement in licensed activities for the time specified in the order. This will assist in conducting inspections and making licensing decisions as to licensees who may be employing individuals who have been subject to enforcement action. It will also provide future employers involved in licensed activity the opportunity to make informed employment decisions, provided that the person complies with the terms of the order and informs the NRC and new employer, as required. If the person does not comply with the terms of the order, the failure to do so, when identified, may subject the offender to a civil penalty or could be referred to the Department of Justice for criminal prosecution.

In sum, orders to unlicensed persons may include requirements such as:

1. A prohibition against any involvement in NRC-licensed activities, generally for a specified period of time. (In the case of a corporation, this could mean not being allowed to supply services or components.)

2. A prohibition against any involvement in NRC-licensed activities until certain conditions are satisfied, e.g., completing specified training or meeting certain qualifications.

3. A requirement to notify the NRC before resuming work in licensed activities.

4. A requirement to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

Orders to licensees who are employers or former employers of individuals subject to orders may include requirements such as:

1. Removal of an individual from licensed activity.

2. A requirement for retraining certain individual(s), as a condition of allowing the person to continue in licensed activities.

3. A requirement to advise any licensee who, as a prospective employer, inquires about an individual, of the existence of any order issued to the individual.

4. A requirement to notify the NRC if the employer rehires or restores the individual to licensed activity, and to state the basis for so doing.

5. A requirement for additional oversight or independent verification of activities performed by the person, if the person is to continue to be involved in licensed activities.

Orders, including orders imposing civil penalties, are published in the Federal Register and NUREG–0940 (Enforcement Actions: Significant Actions Resolved), and are usually the subject of a press release. In addition, the Commission intends to establish a system of records that will include a list of all persons currently subject to an order that affects their participation in licensed activities. The NRC intends to send a list and copies of all currently effective orders to all power reactor licensees twice a year. This compilation will be made available to other licensees and members of the public on request.

The Commission believes that these actions will provide greater assurance that licensees will be aware of persons who have been the subject of an NRC enforcement order. These actions should provide better accountability for employees, consultants, contractors, and vendors in the nuclear industry and thus improve the quality of performance, and therefore, the protection of the public health and safety. Use of these orders should also serve as an effective deterrent to wrongdoers and inadvertent employment of wrongdoers throughout the regulated industry. Adoption of these regulations will not alter the NRC's procedures for referring certain alleged or suspected criminal violations of the Atomic Energy Act to the Department of Justice for appropriate action.

It would be an erroneous reading of the final rule on deliberate misconduct to conclude that conscientious people may be subject to personal liability for mistakes. The Commission realizes that people may make mistakes while acting in good faith. Enforcement actions directly against individuals are not to be used for activities caused by merely negligent conduct. These persons should have no fear of individual liability under this regulation, as the rule requires that there be deliberate misconduct before the rule's sanctions may be imposed. The Commission recognizes, as stated in Section E, "Enforcement Actions Involving Individuals," of the NRC Policy and Procedure for Enforcement Actions; Policy Statement, 10 CFR part 2, appendix C (1989), that enforcement actions involving individuals are significant actions that need to be closely controlled and judiciously applied. The Policy also states that action will not be taken against an individual if the improper conduct was caused solely by management failures.

While it is not necessary for the person to know that a violation would occur because of his or her action, it is necessary that the person recognized that the action was improper and it related to an activity associated with licensed activity, e.g., the person knew a component was being procured for eventual use in a nuclear power plant or for use in a radiographic camera. Thus, it is not a defense that the person did not know the actual requirement being violated and therefore the person would not know the actions were wrong.

The NRC Enforcement Policy currently requires that all enforcement actions involving unlicensed individuals, and licensed individuals pursuant to 10 CFR Part 55, be approved by a Deputy Executive Director. The staff will consult with the Commission before issuing a civil penalty or order to an unlicensed individual or issuing a civil penalty to a licensed reactor operator pursuant to 10 CFR part 55.[2] Prior notice will be given to the Commission on Notices of Violation without civil penalties that are issued to unlicensed individuals and enforcement actions taken against other unlicensed persons, such as corporations or partnerships. Enforcement actions against unlicensed persons, as with other NRC enforcement actions, require the exercise of discretion and will be taken dependent on the circumstances of the case.

While the proposed rule indicates the staff's intention to implement the authority to take enforcement action, including assessing civil penalties, against unlicensed individuals, and the Commission believes it appropriate to have a civil penalty sanction available as an option for unlicensed persons, it is recognized that the normal sanction for unlicensed individuals who deliberately cause violations would be an order removing the individual from licensed activities. As stated in the Enforcement Policy (at footnote 4), "Except for individuals subject to civil penalties under section 206 (concerning noncompliance by vendors) of the Energy Reorganization Act of 1974, as amended, NRC will not normally impose a civil penalty against an individual."

IV. Enforcement Policy

The Commission is also publishing concurrently with these new rules the Enforcement Policy with changes that have been adopted to reflect the new rules. Revisions to the Policy now being made are described in the following paragraphs. Only the sections to which changes were made are discussed here.

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[2] Consultation with the Commission does not preclude the staff from taking immediately effective action under exising regulatory provisions where necessary to protect health and safety, e.g., suspending a license and ordering radioactive sources to be removed.

The numbering of the items discussed tracks the section and paragraph numbers used in the Policy Statement.

I. Introduction and Purpose

In this section the reference to licensees and vendors has been expanded to include "others within NRC's jurisdiction" in order to cover unlicensed persons.

II.B. Procedural Framework

This section has been changed to reflect the new content of 10 CFR 2.202, concerning orders, and 10 CFR 2.204, concerning Demands for Information. It describes who must respond to orders and demands, and also notes that hearing rights apply only to orders.

IV. Enforcement Conferences

This section is revised to reflect enforcement actions taken against unlicensed persons. New language provides that an opportunity to attend an enforcement conference will normally be provided when NRC proposes to take an enforcement action against an unlicensed individual.

V. Enforcement Actions

In this section, the description of elevated enforcement actions is changed to include orders addressed to unlicensed persons.

V.B. Civil Penalty

Table 1A, setting out base civil penalties, is modified in one line to reflect the scope of the new rules. In line f, "Contractors and Vendors" are added to "Industrial Users of Material." The Supplementary information to the proposed rule indicated that in line j, "Other Material Licensees", the words "and other persons subject to NRC jurisdiction" would be added. This change is not being made because civil penalties normally are not intended to be proposed for individuals. Should a civil penalty be proposed for an individual, the amount will be determined based on the circumstances.

V.C. Orders

The discussion of the use of orders is expanded to reflect orders to unlicensed individuals when NRC has identified deliberate misconduct that causes, or but for detection would have caused, a licensee to be in violation of an NRC requirement, or the deliberate submission of inaccurate or incomplete information that is material to the NRC.

V.D. Escalation of Enforcement Sanctions

The description of examples of enforcement action that might be taken has been modified to reflect terms used as a result of this change to part 2. The Table is modified to indicate that a repeat Severity Level III violation may also result in a Demand for Information, if not an Order.

V.E. Enforcement Actions Involving Individuals

In this section, the reference to the NRC being "satisfied" has been substituted for "little doubt" to more precisely state the standard for taking enforcement action. Also, examples have been added to indicate the types of violations that might cause the NRC to take enforcement action against unlicensed persons, particularly individuals. Other examples are added to indicate the types of orders that might be issued and the requirements that they would impose. New language points out that an order or civil penalty against an unlicensed individual must be approved by the Commission.

VIII. Responsibilities

A new item (5) is added to the list of matters in which the staff is required to consult with or provide notice to the Commission.

IX. Enforcement Actions Against Non-Licensees

This section has been renamed from "Vendor Enforcement" and language added to the first paragraph to reflect the additional persons against whom actions may be taken under these new rules.

V. Procedural Actions

Environmental Impact: Categorical Exclusion

With respect to the amendments to part 2, the NRC has determined that the rules are the type of action described in categorical exclusion 10 CFR 51.22(c)(1). With respect to the amendments to parts 30, 40, 50, 60, 61, 70, 72, 110 and 150, the NRC has determined that the rules relate to enforcement matters and, therefore, fall within the scope of 10 CFR 51.10(d). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared in connection with the issuance of the final rules.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget approval number *3150–0136.*

Regulatory Analysis

A. Revisions to Procedures to Issue Orders

The previously existing regulations in 10 CFR 2.202 authorized the NRC, through its designated officials, to institute a proceeding to modify, suspend, or revoke a license by service of an order to show cause on a licensee. The regulations, as previously written, did not provide procedures for the NRC to take direct action against unlicensed persons whose deliberate misconduct causes a licensee to violate Commission requirements, although such action is authorized by the Atomic Energy Act of 1954, as amended. The rules will make the Commission's Rules of Practice more consistent with the Commission's existing statutory authority and provide the appropriate procedural framework to take action, in appropriate cases, in order to protect the public health and safety. The rules also will make clear that hearing rights do not attach to documents which request only the submission of information, consistent with section 189 of the Atomic Energy Act of 1954, as amended, and the Administrative Procedure Act.

B. Deliberate Misconduct by Unlicensed Persons

The Nuclear Regulatory Commission has statutory authority to issue enforcement actions against unlicensed persons whose deliberate misconduct causes a licensee to be in violation of the Commission's requirements. As previously written, the Commission's regulations did not specifically implement that statutory authority and provide for issuance of these actions. In the past, the Commission has issued orders to holders of licenses directing removal of wrongdoers from licensed activities. However, this approach did not satisfy concerns about wrongdoers who may be hired by others in the industry, without knowledge of the prior wrongdoing, or who are rehired by the former employer, in those instances where no order was issued.

The Commission is concerned about a number of incidents of deliberate wrongdoing in recent years in which it has been limited in its ability to address the problem directly or to have some control over the activities of the wrongdoer in the near term. While the number of cases of deliberate misconduct of which the NRC is aware is not large, any number is unacceptable and the potential for injury is serious enough that the problem must be addressed.

The objective of the rule is to put everyone subject to the Commission's jurisdiction on notice that enforcement action might be taken against them for deliberate misconduct or deliberate submission of incomplete or inaccurate information, in relation to NRC licensed activities. Under section 234 of the Atomic Energy Act, the Commission may impose civil penalties on any person who violates any rule, regulation, or order issued under any one of the enumerated provisions of the Act, or who commits a violation for which a license may be revoked. The enforcement actions that may be taken, including orders limiting activities of wrongdoers in the future and civil penalties, will serve as a deterrent to others throughout the industry.

The alternatives available to the Commission are to promulgate a rule, as is done herein, or do nothing. Given the existence of these incidents, and the potential harm to the public as well as individuals working in NRC licensed activities, the alternative of doing nothing was rejected. The benefits of taking enforcement action are similar to those of taking action against licensed entities, in that a civil penalty and attendant adverse publicity encourage future compliance, the Notice of Violation calls for precise response as to corrective action taken, and an enforcement order, if obeyed, will directly control the involvement of an individual in licensed activity. The effect of having these options available in the enforcement program should reduce the probability of repetitive violations by wrongdoers.

The NRC does not anticipate that additional investigations will be necessary to implement the rule because it focuses on the results of investigations. The NRC estimates that fewer than five cases per year will actually result in enforcement action being taken against unlicensed individuals. The actual numbers will depend on the performance of individuals in the industry. The cost of preparing and publishing a very few additional actions per year beyond the current workload of handling more than a hundred escalated enforcement actions per year is not significant.

The rule will be implemented by processing, in the same manner as other escalated enforcement actions, those cases of deliberate misconduct that come to the agency's attention. The Commission will be consulted on actions that involve orders or civil penalties against unlicensed individuals. The Office of Enforcement intends to maintain a list of those enforcement orders applicable to individual wrongdoers and distribute, twice a year to all power reactor licensees, a copy of the list of currently effective orders that restrict individuals from licensed activities and copies of those orders. The same material will be available to others who request it. The cost of distributing this information is relatively small.

In light of the benefits of enabling the NRC to use its statutory authority to address directly the deliberate misconduct of unlicensed persons, it is appropriate that the Commission adopt this rule.

The rules constitute the preferred course of action and the cost involved in its promulgation and application is necessary and appropriate. The foregoing discussion constitutes the regulatory analysis for these rules.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the Commission certifies that the rules do not have a significant economic impact on a substantial number of small entities. The rules establish the procedural mechanism to issue orders and demands for information to unlicensed persons in addition to licensed persons, who were previously covered. In addition, the rules put unlicensed persons on notice that they may be subject to enforcement action if they deliberately cause a licensee to be in violation of Commission requirements. The rules, by themselves, do not impose any additional obligations on entities, including any regulated entities, that may fall within the definition of "small entities" as set forth in section 601(3) of the Regulatory Flexibility Act, or within the definition of "small business" as found in section 3 of the Small Business Act, 15 U.S.C. 632, or within the Small Business Size Standards found in 13 CFR part 121. Any obligations would not be created until an order is issued, at which time the person subject to the order would have a right to a hearing in accordance with the regulations.

Backfit Analysis

These rules do not involve any new provisions that would impose backfits as defined in 10 CFR 50.109(a)(1). Accordingly, a backfit analysis pursuant to 10 CFR 50.109(c) is not required for these rules. However, issuance of orders pursuant to these regulations may involve backfit considerations, which will be addressed on a case-by-case basis.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 30

Byproduct material, Criminal penalty, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Criminal penalty, Government contracts, Hazardous materials—transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Criminal penalty, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 60

Criminal penalty, High-level waste, Nuclear power plants and reactors, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61

Criminal penalty, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Criminal penalty, Hazardous materials—transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 72

Manpower training programs, Nuclear materials, Occupational safety and health, Reporting and recordkeeping requirements, Security measures, Spent fuel.

10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalty, Export, Import, Incorporation by reference, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

10 CFR Part 150

Criminal penalty, Hazardous materials—transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

VI. Final Rules

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR parts 2, 30, 40, 50, 60, 61, 70, 72, 110 and 150.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS

1. The heading of part 2 is revised to read as set forth above.

2. The authority citation for part 2 is revised to read as follows:

Authority: Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87–615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Sec. 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 114(f), Pub. L. 97–425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200–2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948–951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600–2.606 also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C are also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85–256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91–560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99–240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

3. Section 2.1 is revised to read as follows:

§ 2.1 Scope.

This part governs the conduct of all proceedings, other than export and import licensing proceedings described in part 110, under the Atomic Energy Act of 1954, as amended, and the Energy Reorganization Act of 1974, for—

(a) Granting, suspending, revoking, amending, or taking other action with respect to any license, construction permit, or application to transfer a license;

(b) Issuing orders and demands for information to persons subject to the Commission's jurisdiction, including licensees and persons not licensed by the Commission;

(c) Imposing civil penalties under section 234 of the Act; and

(d) Public rulemaking.

4. Section 2.201 is revised to read as follows:

§ 2.201 Notice of violation.

(a) In response to an alleged violation of any provision of the Act or this chapter or the conditions of a license or an order issued by the Commission, the Commission may serve on the licensee or other person subject to the jurisdiction of the Commission a written notice of violation; a separate notice may be omitted if an order pursuant to § 2.202 or demand for information pursuant to § 2.204 is issued that otherwise identifies the apparent violation. The notice of violation will concisely state the alleged violation and will require that the licensee or any other person submit, within twenty (20) days of the date of the notice or other specified time, a written explanation or statement in reply including:

(1) Corrective steps which have been taken by the licensee or other person and the results achieved;

(2) Corrective steps which will be taken; and

(3) The date when full compliance will be achieved.

(b) The notice may require the licensee or other person subject to the jurisdiction of the Commission to admit or deny the violation and to state the reasons for the violation, if admitted. It may provide that, if an adequate reply is not received within the time specified in the notice, the Commission may issue an order or a demand for information as to why the license should not be modified, suspended or revoked or why such other action as may be proper should not be taken.

5. Section 2.202 is revised to read as follows:

§ 2.202 Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing; and

(5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued. Except as provided in paragraph (d) of this section, the answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent, in the answer or other written document, of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e) If the order involves the modification of a part 50 license and is a backfit, the requirements of § 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

6. Section 2.204 is revised to read as follows:

§ 2.204 Demand for information.

(a) The Commission may issue to a licensee or other person subject to the jurisdiction of the Commission a demand for information for the purpose of determining whether an order under § 2.202 should be issued, or whether other action should be taken, which demand will:

(1) Allege the violations with which the licensee or other person is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for issuing the demand; and

(2) Provide that the licensee must, or the other person may, file a written answer to the demand for information under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the demand for information.

(b) A licensee to whom the Commission has issued a demand for information under this section must respond to the demand by filing a written answer under oath or affirmation; any other person to whom the Commission has issued a demand for information may, in its discretion, respond to the demand by filing a written answer under oath or affirmation. The licensee's answer shall specifically admit or deny each allegation or charge made in the demand for information, and shall set forth the matters of fact and law on which the licensee relies. A person other than a licensee may answer as described above, or by setting forth its reasons why the demand should not have been issued and, if the requested information is not provided, the reasons why it is not provided.

(c) Upon review of the answer filed pursuant to paragraph (a)(2) of this section, or if no answer is filed, the Commission may institute a proceeding pursuant to 10 CFR 2.202 to take such action as may be proper.

(d) An answer may consent to the entry of an order pursuant to § 2.202 in substantially the form proposed in the demand for information. Such consent shall constitute a waiver as provided in § 2.202(d).

7. Section 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules in this subpart govern procedure in all adjudications initiated by the issuance of an order pursuant to § 2.202, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action issued pursuant to § 2.105, or a notice issued pursuant to § 2.102(d)(3). The procedures applicable to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are set forth in Subpart J.

8. Appendix C to part 2 is amended by revising the introductory paragraph to the appendix, section I, section II.B., section IV, the introductory paragraph of section V, Table 1A to section V, section V.C., Table 2 to section V.D., section V.E., section VIII, the heading and the first 2 paragraphs of section IX to read as follows:

Appendix C—General Statement of Policy and Procedure for NRC Enforcement Actions

The following statement of general policy and procedure explains the enforcement policy and procedures of the U.S. Nuclear Regulatory Commission and its staff in initiating enforcement actions, and of presiding officers and the Commission in reviewing these actions. This statement is applicable to enforcement in matters involving the public health and safety, the common defense and security, and the environment.[1] This statement of general policy and procedure is published in the Code of Federal Regulations to provide widespread dissemination of the Commission's Enforcement Policy. However, this is a policy statement and not a regulation. The Commission may deviate from this statement of policy and procedure as is appropriate under the circumstances of a particular case.

[1] Antitrust enforcement matters will be dealt with on a case-by-case basis.

I. Introduction and Purpose

The purpose of the NRC enforcement program is to promote and protect the radiological health and safety of the public, including employees' health and safety, the common defense and security, and the environment by:

- Ensuring compliance with NRC regulations and license conditions;
- Obtaining prompt correction of violations and adverse quality conditions which may affect safety;
- Deterring future violations and occurrences of conditions adverse to quality; and
- Encouraging improvement of licensee and vendor [1a] performance, and by example, that of industry, including the prompt identification and reporting of potential safety problems.

Consistent with the purpose of this program, prompt and vigorous enforcement action will be taken when dealing with licensees, vendors, contractors, and employees of any of them, who do not achieve the necessary meticulous attention to detail and the high standard of compliance which the NRC expects. Each enforcement action is dependent on the circumstances of the case and requires the exercise of discretion after consideration of these policies and procedures. In no case, however, will licensees who cannot achieve and maintain adequate levels of protection be permitted to conduct licensed activities.

II. Statutory Authority and Procedural Framework

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B. Procedural Framework

Subpart B of 10 CFR part 2 of NRC's regulations sets forth the procedures the NRC uses in exercising its enforcement authority. 10 CFR 2.201 sets forth the procedures for issuing notices of violation.

The procedure to be used in assessing civil penalties is set forth in 10 CFR 2.205. This regulation provides that the civil penalty process is initiated by issuing a notice of violation and proposed imposition of a civil penalty. The licensee or other person is provided an opportunity to contest in writing the proposed imposition of a civil penalty. After evaluation of the response, the civil penalty may be mitigated, remitted, or imposed. An opportunity is provided for a hearing if a civil penalty is imposed.

The procedure for issuing an order to institute a proceeding to modify, suspend, or revoke a license or to take other action against a licensee or other person subject to the jurisdiction of the Commission is set forth in 10 CFR 2.202. The licensee or other person to whom the order is issued must file a written answer to the order. The licensee or any other person adversely affected by the order may request a hearing. The NRC is authorized to make orders immediately effective if the public health, safety or interest so requires or if the alleged violation

[1a] The term "vendor" means a supplier of products or services to be used in an NRC-licensed facility or activity.

is willful. Section 2.204 sets out the procedure for issuing a Demand for Information to a licensee or other person subject to the Commission's jurisdiction for the purpose of determining whether an order or other enforcement action should be issued. The Demand does not provide hearing rights, as only information is being sought. A licensee must answer a demand. An unlicensed person may answer a Demand by either providing the requested information or explaining why the Demand should not have been issued.

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IV. Enforcement Conferences

Whenever the NRC has learned of the existence of a potential violation for which a civil penalty or other escalated enforcement action may be warranted, or recurring nonconformance on the part of a vendor, the NRC will normally provide an opportunity for an enforcement conference with the licensee, vendor, or other person, prior to taking enforcement action. The NRC may also elect to hold an enforcement conference for other violations, e.g., Severity Level IV violation which, if repeated, could lead to escalated enforcement action. The purpose of the enforcement conference is to (1) discuss the violations or nonconformance, their significance and causes, and the licensee's or vendor's corrective actions, (2) determine whether there are any aggravating or mitigating circumstances, and (3) obtain other information which will help determine the appropriate enforcement action.

In addition, during the enforcement conference, an opportunity will be provided to explain to the NRC what corrective actions (if any) were taken or will be taken following discovery of the potential violation or nonconformance. Licensees, vendors, or other persons will be told when a meeting is an enforcement conference. Enforcement conferences will not normally be open to the public.

When needed to protect the public health and safety or common defense and security, escalated enforcement action, such as the issuance of an immediately effective order modifying, suspending, or revoking a license, will be taken prior to the enforcement conference. In such cases, an enforcement conference may be held after the escalated enforcement action is taken.

V. Enforcement Actions

This section describes the enforcement sanctions available to NRC and specifies the conditions under which each may be used. The basic sanctions are notices of violation, civil penalties, and orders of various types. Additionally, related administrative mechanisms such as bulletins and confirmatory action letters, notices of nonconformance and notices of deviation are used to supplement the enforcement program. In selecting the enforcement sanctions to be applied, NRC will consider enforcement actions taken by other Federal or State regulatory bodies having concurrent jurisdiction, such as in transportation matters. Usually whenever a violation of NRC requirements is identified, enforcement action is taken. The nature and extent of the enforcement action is intended to reflect the seriousness of the violation involved. For the vast majority of violations, action by an NRC regional office is appropriate in the form of a Notice of Violation requiring a formal response from the recipient describing its corrective actions. In most situations involving nonconformance on the part of a vendor, a Notice of Nonconformance will be issued. The relatively small number of cases involving elevated enforcement action receives substantial attention by the public, and may have significant impact on the licensee's operation. These elevated enforcement actions include civil penalties; orders modifying, suspending or revoking licenses; orders addressed to unlicensed persons, or orders to cease and desist from designated activities.

* * * * *

TABLE 1A.—BASE CIVIL PENALTIES

	Plant operations, const, health physics and EP	Safeguards	Transportation	
			Greater than type A quantity [1]	Type A quantity or less [2]
a. Power Reactors	$100,000	$100,000	$100,000	$5,000
b. Test Reactors	10,000	10,000	10,000	2,000
c. Research Reactors & Critical Facilities	5,000	5,000	5,000	1,000
d. Fuel Fabricators and Industrial Processors [3]	25,000	[4] 100,000	25,000	5,000
e. Mills and Uranium Conversion Facilities	10,000		5,000	2,000
f. Industrial Users of Material, Contractors,[5] and Vendors	10,000		5,000	2,000
g. Waste Disposal Licensees	10,000		5,000	2,000
h. Academic or Medical Institutions [6]	5,000		2,500	1,000
i. Independent spent fuel and monitored retrievable storage installations	25,000	100,000	25,000	5,000
j. Other Material Licensees	1,000		2,500	1,000

[1] Includes irradiated fuel, high level waste, unirradiated fissile material, and any other quantities requiring Type B packaging.
[2] Includes low specific activity waste (LSA), low level waste, Type A packages, and excepted quantities and articles.
[3] Large firms engaged in manufacturing or distribution of byproduct, source, or special nuclear material.
[4] This amount refers to Category 1 licensees (as defined in 10 CFR 73.2). Licensed fuel fabricators not authorized to possess Category 1 material have a base penalty amount of $50,000.
[5] Includes industrial radiographers, nuclear pharmacies, and other industrial users.
[6] This applies to nonprofit institutions not otherwise categorized under sections "a" through "g" in this table.

* * * * *

C. Orders

An order is a written NRC directive to modify, suspend, or revoke a license; to cease and desist from a given practice or activity; or to take such other action as may be proper (see 10 CFR 2.202). Orders may be issued as follows. Orders may also be issued in lieu of, or in addition to, civil penalties, as appropriate.

(1) License Modification Orders are issued when some change in licensee equipment, procedures, or management controls is necessary.

(2) Suspension Orders may be used:

(a) To remove a threat to the public health and safety, common defense and security, or the environment;

(b) To stop facility construction when (i) further work could preclude or significantly hinder the identification or correction of an improperly constructed safety-related system or component, or (ii) the licensee's quality assurance program implementation is not adequate to provide confidence that construction activities are being properly carried out;

(c) When the licensee has not responded adequately to other enforcement action;

(d) When the licensee interferes with the conduct of an inspection or investigation; or

(e) For any reason not mentioned above for which license revocation is legally authorized.

Suspensions may apply to all or part of the licensed activity. Ordinarily, a licensed activity is not suspended (nor is a suspension prolonged) for failure to comply with requirements where such failure is not willful and adequate corrective action has been taken.

(3) Revocation Orders may be used:

(a) When a licensee is unable or unwilling to comply with NRC requirements.

(b) When a licensee refuses to correct a violation,

(c) When a licensee does not respond to a notice of violation where a response was required,

(d) When a licensee refuses to pay a fee required by 10 CFR Part 170, or

(e) For any other reason for which revocation is authorized under Section 186 of the Atomic Energy Act (e.g., any condition which would warrant refusal of a license on an original application).

(4) Cease and Desist Orders are typically used to stop an unauthorized activity that has continued after notification by NRC that such activity is unauthorized.

(5) Orders to unlicensed persons, including vendors, contractors, and employees of any of them, are used when the NRC has identified deliberate misconduct that may cause a licensee to be in violation of an NRC requirement or where incomplete or inaccurate information is deliberately submitted and where the NRC loses its reasonable assurance that the licensee will meet NRC requirements with that person involved in licensed activities.

Orders are made effective immediately, without prior opportunity for hearing, whenever it is determined that the public health, interest, or safety so requires, or when the order is responding to a violation involving willfulness. Otherwise, a prior opportunity for a hearing on the order is afforded. For cases in which the NRC believes a basis could reasonably exist for not taking the action as proposed, the licensee will ordinarily be afforded an opportunity to show why the order should not be issued in the proposed manner.

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D. Escalation of Enforcement Sanctions

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TABLE 2.—EXAMPLES OF PROGRESSION OF ESCALATED ENFORCEMENT ACTIONS FOR SIMILAR VIOLATIONS IN THE SAME ACTIVITY AREA UNDER THE SAME LICENSE

Severity of violation	Number of similar violations from the date of the last inspection or within the previous two years (whichever period is greater)		
	1st	2nd	3rd
I	a+b	a+b+c	d
II	a	a+b	a+b+c
III		a+c	a+b

a. Civil penalty.
b. Suspension of affected operations until the Office Director is satisfied that there is reasonable assurance that the licensee can operate in compliance with the applicable requirements; or modification of the license, as appropriate.
c. Consider issuing an order for modification, suspension, or revocation of the license, as appropriate, through use of a Demand for Information.
d. Further action, as appropriate.

E. Enforcement Actions Involving Individuals

Enforcement actions involving individuals, including licensed operators, are significant personnel actions, which will be closely controlled and judiciously applied. An enforcement action will normally be initiated only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew or should have known, the required actions; and knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance. Most transgressions of individuals at the level of Severity Level III, IV, or V violations will be handled by citing only the facility licensee.

More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual. Action against the individual, however, will not be taken if the improper action by the individual was caused by management failures. The following examples of situations illustrate this concept:

- Inadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee.
- Inadvertently missing a procedural requirement when the action is routine, fairly uncomplicated, and there is no unusual circumstance indicating that the procedures should be referred to and followed step-by-step.
- Compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation unless the individual did not express his or her concern or objection to the direction.
- Individual error directly resulting from following the technical advice of an expert unless the advice was clearly unreasonable and the individual should have recognized it as such.
- Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected.

Listed below are examples of situations which could result in enforcement actions involving individuals, licensed or unlicensed. If the actions described in these examples are taken by a licensed operator or taken deliberately by an unlicensed individual, enforcement action may be taken directly against the individual. The situations include, but are not limited to, violations which involve:

- Willfully causing a licensee to be in violation of NRC requirements.
- Willfully taking action that would have caused a licensee to be in violation of NRC requirements but the action did not do so because it was detected and corrective action taken.
- Recognizing a violation of procedural requirements and willfully not taking corrective action.
- Willfully defeating alarms that have safety significance.
- Dereliction of duty.
- Falsifying records required by NRC regulations or by the facility licensee.
- Willfully providing, or causing a licensee to provide, an NRC inspector or investigator with inaccurate or incomplete information on a matter material to the NRC.
- Willfully withholding safety significant information rather than making that information known to appropriate supervisory or technical personnel.
- Submitting false information and as a result gaining unescorted access to a nuclear power plant.
- Willfully providing false data to a licensee by a contractor or other person who provides test services, when the data affects the licensee's compliance with 10 CFR part 50, appendix B, or other regulatory requirement.
- Willfully providing false certification that components meet the requirements of their intended use, such as ASME code.
- Willfully supplying, by vendors of transportation, casks that do not comply with their certificates of compliance.
- Willfully performing unauthorized bypassing of required reactor or other facility safety systems.
- Unauthorized abandoning of reactor controls.
- Willfully taking actions that violate Technical Specification Limiting Conditions for Operation (enforcement action for a willful violation will not be taken if the operator meets the standards of 10 CFR 50.54(x), i.e., unless the operator acted unreasonably considering all the relevant circumstances surrounding the emergency.)
- Willfully failing to take "immediate actions" specified by emergency procedures.

In deciding when to issue an order to an unlicensed person rather than the licensee, the NRC recognizes that judgments will have to be made on a case by case basis. In making these decisions, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, e.g., personal or corporate gain.
5. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
6. The employer's response, e.g., disciplinary action taken.
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

Any proposed enforcement action involving individuals must be issued with the concurrence of the appropriate Deputy Executive Director. The Commission will be consulted prior to issuing a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator. The particular sanction to be used should be determined on a case-by-case basis.[4]

[4] Except for individuals subject to civil penalties under section 206 of the Energy Reorganization Act of 1974, as amended, NRC will not normally impose

Continued

Examples of sanctions that may be appropriate against individuals are:

- Issuance of a letter of reprimand,
- Issuance of a Notice of Violation, and
- Issuance of Orders. Orders to NRC licensed operators may involve suspension for a specified period, modification, or revocation of the license. Orders to unlicensed individuals might include provisions that would:
- Prohibit involvement in NRC licensed activities for a specified period of time (normally the period of suspension would not exceed five years) or until certain conditions are satisfied, e.g. completing specified training or meeting certain qualifications.
- Require notification to the NRC before resuming work in licensed activities.
- Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

In addition, NRC may take enforcement action against a licensee that may impact an individual, where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted. The NRC may take enforcement action for reasons that would warrant refusal to issue a license on an original application. Accordingly, enforcement action may be taken to modify a license to address concerns regarding matters that raise issues of integrity, competence, fitness for duty or other matters that may not necessarily be a violation of specific Commission requirements.

In the case of an unlicensed person, whether a firm or individual, an Order modifying the facility license may be issued to require (1) the removal of the person from all nuclear-related activities for a specified period of time or indefinitely, as appropriate, (2) prior notice before utilizing the person in licensed activities, or (3) the licensee to provide notice of the issuance of such an order to other persons who make reference inquiries and are involved in licensed activities. In addition, orders to employers might require retraining, additional oversight, or independent verification of activities performed by the person, if the person is to be involved in licensed activities.

* * * * *

VIII. Responsibilities

The Deputy Executive Director for Nuclear Materials Safety, Safeguards, and Operations Support (DEDS) and the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations and Research (DEDR), as the principal enforcement officers of the NRC, have been delegated the authority to issue notices of violations, civil penalties, and orders.[5] Regional Administrators may also issue notices of violation for Severity Level IV and V violations and may sign notices of violation for Severity Level III violations with no proposed civil penalty and proposed civil penalty actions with the concurrence of the DEDR for reactor licensees and the DEDS for materials licensees. In recognition that the regulation of nuclear activities in many cases does not lend itself to a mechanistic treatment, the appropriate Deputy Executive Director or the Regional Administrator must exercise judgment and discretion in determining the severity levels of the violations and the appropriate enforcement sanctions, including the decision to issue a Notice of Violation, or to propose or impose a civil penalty and the amount of such penalty, after considering the general principles of this statement of policy and the technical significance of the violations and the surrounding circumstances.

The Commission will be provided written notification of all enforcement actions involving civil penalties or orders. The Commission will be consulted prior to taking action in the following situations (unless the urgency of the situation dictates immediate action):

(1) An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;

(2) Proposals to impose civil penalties in amounts greater than 3 times the Severity Level I values shown in Table 1A;

(3) Any proposed enforcement action that involves a Severity Level I violation;

(4) Any enforcement action that involves a finding of a material false statement;

(5) Any proposed enforcement action involving a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator;

(6) Refraining from taking enforcement action for matters meeting the criteria of section V.G.2.

(7) Any action the Office Director believes warrants Commission involvement; or

(8) Any proposed enforcement action on which the Commission asks to be consulted.

IX. Enforcement Action Against Non-Licensees

The Commission's enforcement policy also applies to non-licensees, including employees of licensees, to contractors, subcontractors, and employees of contractors or subcontractors, who knowingly provide components, equipment, or other goods or services that relate to a licensee's activities subject to NRC regulation. The prohibitions and sanctions for any of these persons who engage in deliberate misconduct or submission of incomplete or inaccurate information are provided in the rule on deliberate misconduct.

Vendors of products or services provided for use in nuclear activities are subject to certain requirements designed to ensure that the products or services supplied that could affect safety are of high quality. Through procurement contracts with reactor licensees, vendors are required to have quality assurance programs that meet applicable requirements including 10 CFR part 50, appendix B, and 10 CFR part 71, subpart H. Vendors of reactor and materials licensees and part 71 licensees are subject to the requirements of 10 CFR part 21 regarding reporting of defects in basic components.

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PART 30—RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

9. The authority citation for Part 30 is revised to read as follows:

Authority: Secs. 81, 82, 161, 182, 183, 186, 68 Stat. 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2111, 2112, 2201, 2232, 2233, 2236, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 30.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 30.34(b) also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 30.61 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 30.3, 30.10, 30.34 (b), (c), (f), (g), and (i), 30.41 (a) and (c), and 30.53 are issued under sec. 161b, 68 Stat. 948,

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a civil penalty against an individual. However, section 234 of the Atomic Energy Act (AEA) gives the Commission authority to impose civil penalties for violations on "any person". "Person" is broadly defined in Section 11s of the AEA to include individuals, a variety of organizations, and any representatives or agents. This gives the Commission authority to impose civil penalties on employees of licensees or on separate entities when a violation of a requirement directly imposed on them is committed.

[5] The DEDS is responsible to the EDO for the oversight of enforcement programs. The Director, Office of Enforcement, acts for the Deputy Executive Directors in enforcement matters in their absence or as directed. The Directors of the Offices of Nuclear Reactor Regulation (NRR) and Nuclear Material Safety and Safeguards (NMSS) have also been delegated authority to issue orders, but it is expected that normal use of this authority by NRR and NMSS will be confined to actions necessary in the interest of public health and safety. The Director, Office of the Controller has been delegated the authority to issue orders where licensees violate Commission regulations by nonpayment of license fees.

as amended (42 U.S.C. 2201(b)); § 30.10 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 30.6, 30.9, 30.34(g), 30.36, 30.51, 30.52, 30.55, and 30.56 (b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

10. Section 30.1 is revised to read as follows:

§ 30.1 Scope.

This part prescribes rules applicable to all persons in the United States governing domestic licensing of byproduct material under the Atomic Energy Act of 1954, as amended (68 Stat. 919), and under Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242), and exemptions from the domestic licensing requirements permitted by section 81 of the Act. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 30.10.

11. Immediately following § 30.9, a new § 30.10 is added to read as follows:

§ 30.10 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 40—DOMESTIC LICENSING OF SOURCE MATERIAL

12. The authority citation for part 40 is revised to read as follows:

Authority: Secs. 62, 63, 64, 65, 81, 161, 182, 183, 186, 68 Stat. 932, 933, 935, 948, 953, 954, 955, as amended, secs. 11e(2), 83, 84, Pub. L. 95–604, 92 Stat. 3033, as amended, 3039, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2232, 2233, 2236, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688 (42 U.S.C. 2021); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 275, 92 Stat. 3021, as amended by Pub. L. 97–415, 96 Stat. 2067 (42 U.S.C. 2022).

Section 40.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 40.31(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 40.46 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 40.71 also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 40.3, 40.10, 40.25(d) (1)–(3), 40.35 (a)–(d) and (f), 40.41 (b) and (c), 40.46, 40.51 (a) and (c), and 40.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 40.10 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201 (i)); and §§ 40.5, 40.9, 40.25 (c), (d) (3), and (4), 40.26(c)(2), 40.35(e), 40.42, 40.61, 40.62, 40.64, and 40.65 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

13. Section 40.2 is revised to read as follows:

§ 40.2 Scope.

Except as provided in §§ 40.11 to 40.14, inclusive, the regulations in this part apply to all persons in the United States. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 40.10.

14. Immediately following § 40.9, a new § 40.10 is added to read as follows:

§ 40.10 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

15. The authority citation for part 50 is revised to read as follows:

Authority: Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 1244, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 936, 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13 and 50.54(dd) also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and Appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Appendix F also

issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

For purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 50.5, 50.46 (a) and (b), and 50.54(c) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 50.5, 50.7(a), 50.10 (a)–(c), 50.34(a) and (e), 50.44 (a)–(c), 50.46 (a) and (b), 50.47(b), 50.48 (a), (c), (d), and (e), 50.49(a), 50.54(a), (i), (i)(1), (l)–(n), (p), (q), (t), (v), and (y), 50.55(f), 50.55a (a), (c)–(e), (g), and (h), 50.59(c), 50.60(a), 50.62(c), 50.64(b), and 50.80 (a) and (b) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 50.49 (d), (h), and (j), 50.54 (w), (z), (bb), (cc), and (dd), 50.55(e), 50.59(b), 50.61(b), 50.62(b), 50.70(a), 50.71 (a)–(c) and (e), 50.72(a), 50.73 (a) and (b), 50.74, 50.78, and 50.90 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

16. Section 50.1 is revised to read as follows:

§ 50.1 Basis, purpose, and procedures applicable.

The regulations in this part are promulgated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended (68 Stat. 919), and Title II of the Energy Reorganization Act of 1974 (88 Stat. 1242), to provide for the licensing of production and utilization facilities. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 50.5.

17. Section 50.5 is added to read as follows:

§ 50.5 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 60—DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

18. The authority citation for part 60 is revised to read as follows:

Authority: Secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 929, 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 114, 121, Pub. L. 97–425, 96 Stat. 2213(g), 2228 as amended (42 U.S.C. 10134, 10141).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); § 60.11 is issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 60.11 is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 60.10, 60.71 to 60.75 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

19. Section 60.1 is revised to read as follows:

§ 60.1 Purpose and scope.

This part prescribes rules governing the licensing of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated in accordance with the Nuclear Waste Policy Act of 1982. This part does not apply to any activity licensed under another part of this chapter. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 60.11.

20. Immediately following § 60.10, a new § 60.11 is added to read as follows:

§ 60.11 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 61—LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

21. The authority citation for part 61 is revised to read as follows:

Authority: Secs. 53, 57, 62, 63, 65, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2232, 2233); secs. 202, 206, 88 Stat. 1244, 1246 (42 U.S.C. 5842, 5846); secs. 10 and 14, Pub. L. 95–601, 92 Stat. 2951 (42 U.S.C. 2021a and 5851).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); Tables 1 and 2, §§ 61.3, 61.9b, 61.24, 61.25, 61.27(a), 61.41 through 61.43, 61.52, 61.53, 61.55, 61.56, and 61.61 through 61.63 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); § 61.9b is issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); §§ 61.9a, 61.10 through 61.16, 61.24, and 61.80 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

22. In § 61.1, paragraph (c) is added to read as follows:

§ 61.1 Purpose and scope.

* * * * *

(c) This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 61.9b.

23. Immediately following § 61.9a, a new § 61.9b is added to read as follows:

§ 61.9b Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 70—DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

24. The authority citation for part 70 is revised to read as follows:

Authority: Secs. 51, 53, 161, 182, 183, 68 Stat. 929, 930, 948, 953, 954, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2282); secs. 201, as amended, 202, 204, 206, 88 Stat. 1242, as amended, 1244, 1245, 1246 (42 U.S.C. 5841, 5842, 5845, 5846).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 70.7 also issued under Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 70.21(g) also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 70.31 also issued under sec. 57d, Pub. L. 93-377, 88 Stat. 475 (42 U.S.C. 2077). Sections 70.36 and 70.44 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 70.61 also issued under secs. 186, 187, 68 Stat. 955 (42 U.S.C. 2236, 2237). Section 70.62 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 70.3, 70.10, 70.19(c), 70.21(c), 70.22(a), (b), (d)-(k), 70.24(a) and (b), 70.32(a)(3), (5), (6), (d), and (i), 70.36, 70.39(b) and (c), 70.41(a), 70.42(a) and (c), 70.56, 70.57(b), (c), and (d), 70.58(a)-(g)(3), and (h)-(j) are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 70.7, 70.10, 70.20a(a) and (d), 70.20b(c) and (e), 70.21(c), 70.24(b), 70.32(a)(6), (c), (d), (e), and (g), 70.36, 70.51(c)-(g), 70.56, 70.57(b) and (d), and 70.58 (a)-(g)(3) and (h)-(j) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 70.5, 70.9, 70.20b(d) and (e), 70.38, 70.51(b) and (i), 70.52, 70.53, 70.54, 70.55, 70.58(g)(4), (k), and (l), 70.59, and 70.60(b) and (c) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

25. Section 70.2 is revised to read as follows:

§ 70.2 Scope.

Except as provided in §§ 70.11 to 70.13, inclusive, the regulations in this part apply to all persons in the United States. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 70.10.

26. Immediately following § 70.9, a new § 70.10 is added to read as follows:

§ 70.10 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

27. The authority citation for part 72 is revised to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86-373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95-601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851); sec. 102, Pub. L. 91-190, 83 Stat. 853 (42 U.S.C. 4332); Secs. 131, 132, 133, 135, 137, 141, Pub. L. 97-425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100-203, 101 Stat. 1330-232, 1330-236 (42 U.S.C. 10162(b), 10168(c), (d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100-203, 101 Stat. 1330-235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97-425, 96 Stat. 2202, 2203, 2204, 2222, 2224 (42 U.S.C. 10101, 10137(a), 10161(h)).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 72.6, 72.12, 72.22, 72.24, 72.26, 72.28(d), 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48(a), 72.50(a), 72.52(b), 72.72(b), (c), 72.74(a), (b), 72.76, 72.78, 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.148, 72.154, 72.156, 72.160, 72.166,

72.168, 72.170, 72.172, 72.176, 72.180, 72.184, 72.186 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 72.10(a), (e), 72.12, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(a), (b)(1), (4), (5), (c), (d)(1), (2), (e), (f), 72.48 (a), 72.50(a), 72.52(b), 72.90(a)–(d), 72.92, 72.94, 72.98, 72.100, 72.102(c), (d), (f), 72.104, 72.106, 72.120, 72.122, 72.124, 72.126, 72.128, 72.130, 72.140(b), (c), 72.142, 72.144, 72.146, 72.148, 72.150, 72.152, 72.154, 72.156, 72.158, 72.160, 72.162, 72.164, 72.166, 72.168, 72.170, 72.172, 72.176, 72.180, 72.182, 72.184, 72.186, 72.190, 72.192, 72.194 are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 72.10(e), 72.11, 72.16, 72.22, 72.24, 72.26, 72.28, 72.30, 72.32, 72.44(b)(3), (c)(5), (d)(3), (e), (f), 72.48(b), (c), 72.50(b), 72.54(a), (b), (c), 72.56, 72.70, 72.72, 72.74(a), (b), 72.76(a), 72.78(a), 72.80, 72.82, 72.92(b), 72.94(b), 72.140(b), (c), (d), 72.144(a), 72.146, 72.148, 72.150, 72.152, 72.154(a), (b), 72.156, 72.160, 72.162, 72.168, 72.170, 72.172, 72.174, 72.176, 72.180, 72.184, 72.186, 72.192 are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

28. In § 72.2, paragraph (f) is added to read as follows:

§ 72.2 Scope.

* * * * *

(f) This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 72.12.

29. Immediately following § 72.11, a new § 72.12 is added to read as follows:

§ 72.12 Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

30. The authority citation for part 110 is revised to read as follows:

Authority: Secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 68 Stat. 929, 930, 931, 932, 933, 936, 937, 948, 953, 954, 955, 956, as amended (42 U.S.C. 2071, 2073, 2074, 2077, 2092–2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154–2158, 2201, 2231–2233, 2237, 2239); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Section 110.1(b)(2) also issued under Pub. L. 96–92, 93 Stat. 710 (22 U.S.C. 2403). Section 110.11 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152) and secs. 54c and 57d., 88 Stat. 473, 475 (42 U.S.C. 2074). Section 110.27 also issued under sec. 309(a), Pub. L. 99–440. Section 110.50(b)(3) also issued under sec. 123, 92 Stat. 142 (42 U.S.C. 2153). Section 110.51 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Section 110.52 also issued under sec. 186, 68 Stat. 955 (42 U.S.C. 2236). Sections 110.80–110.113 also issued under 5 U.S.C. 552, 554. Sections 110.30–110.35 also issued under 5 U.S.C. 553.

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 110.20–110.29, 110.50, and 110.120–110.129 also issued under secs. 161b and i, 68 Stat. 948, 949, as amended (42 U.S.C. 2201(b) and (i)); § 110.7b is issued under sec 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 110.7a, 110.53 also issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

31. In § 110.1, paragraph (a) is revised to read as follows:

§ 110.1 Purpose and scope.

(a) The regulations in this part prescribe licensing, enforcement, and rulemaking procedures and criteria, under the Atomic Energy Act, for the export of nuclear equipment and material, as set out in § 110.8, and the import of nuclear equipment and material, as set out in § 110.9. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of § 110.7b.

* * * * *

32. Section 110.7b is added to read as follows:

§ 110.7b Deliberate misconduct.

(a) Any licensee or any employee of a licensee; and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee, who knowingly provides to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part; may not:

(1) Engage in deliberate misconduct that causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission, or

(2) Deliberately submit to the NRC, a licensee, or a licensee's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.

(b) A person who violates paragraph (a)(1) or (a)(2) of this section may be subject to enforcement action in accordance with the procedures in 10 CFR part 2, subpart B.

(c) For purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means an intentional act or omission that the person knows:

(1) Would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation, of any license issued by the Commission, or

(2) Constitutes a violation of a requirement, procedure, instruction, contract, purchase order or policy of a licensee, contractor, or subcontractor.

PART 150—EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

33. The authority citation for part 150 is revised to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended, sec. 274, 73 Stat. 688 (42 U.S.C. 2201, 2021); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under secs. 11e(2), 81, 68 Stat. 923, 935, as amended, secs. 83, 84, 92 Stat. 3033, 3039 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under sec. 53, 68 Stat. 930, as amended (42 U.S.C. 2073).

Section 150.15 also issued under secs. 135, 141, Pub. L. 97–425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 150.17a also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Section 150.30 also issued under sec. 234, 83 Stat. 444 (42 U.S.C. 2282).

For the purposes of sec. 223, 68 Stat. 958, as amended (42 U.S.C. 2273); §§ 150.20(b) (2)–(5) and 150.21 are issued under sec. 161b, 68 Stat. 948, as amended (42 U.S.C. 2201(b)); §§ 150.14 and 150.20(b)(5) are issued under sec. 161i, 68 Stat. 949, as amended (42 U.S.C. 2201(i)); and §§ 150.16–150.19 and 150.20(b)(1) are issued under sec. 161o, 68 Stat. 950, as amended (42 U.S.C. 2201(o)).

34. Section 150.2 is revised to read as follows:

§ 150.2 Scope.

The regulations in this part apply to all States that have entered into agreements with the Commission or the Atomic Energy Commission pursuant to subsection 274b of the Act. This part also gives notice to all persons who knowingly provide to any licensee, contractor, or subcontractor, components, equipment, materials, or other goods or services, that relate to a licensee's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of §§ 30.10, 40.10, and 70.10.

35. Section 150.20, the introductory text of paragraph (b) is revised to read as follows:

§ 150.20 Recognition of Agreement State licenses.

* * * * *

(b) Notwithstanding any provision to the contrary in any specific license issued by an Agreement State to a person engaging in activities in a non-Agreement State or in offshore waters under the general licenses provided in this section, the general licenses provided in this section are subject to the provisions of §§ 30.7 (a) through (g), 30.9, 30.10, 30.14(d), 30.34, 30.41, 30.51 to 30.63, inclusive, of part 30 of this chapter; §§ 40.7 (a) through (g), 40.9, 40.10, 40.41, 40.51, 40.61, 40.63 inclusive, 40.71 and 40.81 of part 40 of this chapter; and §§ 70.7 (a) through (g), 70.9, 70.10, 70.32, 70.42, 70.51 to 70.56, inclusive, §§ 70.60 to 70.62, inclusive, and § 70.7 of part 70 of this chapter; and to the provisions of 10 CFR part 19, 20 and 71 and subpart B of part 34 of this chapter. In addition, any person engaging in activities in non-Agreement States or in offshore waters under the general licenses provided in this section:

* * * * *

Dated at Rockville, MD, this 7th day of August, 1991.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 91–19222 Filed 8–14–91; 8:45 am]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Privacy Act of 1974; Report of New Systems of Records

AGENCY: Nuclear Regulatory Commission.

ACTION: Establishment of new system of records.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations to provide for issuing enforcement actions to unlicensed persons whose deliberate misconduct causes a licensee to be in violation of Commission requirements. The NRC also issues Orders, Civil Penalties, Letters of Reprimand, and Demands for Information to individuals who are licensed reactor operators. Currently, NRC maintains enforcement records by licensees and not the name of unlicensed individuals who may be involved in enforcement actions. The NRC is proposing to establish a new system of records, NRC-3, Enforcement Actions Against Individuals, that will contain records accessible by personal identifier of both licensed and unlicensed individuals and that are maintained and used by the Office of Enforcement in conducting the enforcement program for the protection of the public health and safety.

DATES: The proposed new system of records will take effect without further notice October 15, 1991, unless comments received on or before that date cause a contrary decision. If, based on NRC's review of comments received, changes are made, NRC will publish a new final notice.

ADDRESSES: Send comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch. Comments may be hand delivered to Lower Level, Gelman Building, 2120 L Street NW., Washington, DC, between 7:45 a.m. and 4:15 pm.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC, Telephone: 301-492-0741.

SUPPLEMENTARY INFORMATION: The NRC's enforcement authority is drawn from the Atomic Energy Act of 1954 (AEA) and the Energy Reorganization Act of 1974 (ERA). Section 161 of the AEA authorizes NRC to conduct inspections and investigations and to issue orders as necessary to promote common defense or to protect public health. Section 186 authorizes NRC to revoke licenses under certain circumstances, such as violation of an NRC regulation. Section 234 authorizes NRC to issue civil penalties for violations of certain provisions of the Act, as do sections 84 and 147. Section 232 authorizes NRC to seek injunctive or other equitable relief.

Chapter 18 of the AEA provides varying levels of criminal penalties for willful violations of the Act or regulations or orders issued under certain sections of the Act.

Section 206 of the ERA authorizes NRC to impose civil penalties for knowing failures to provide certain safety information to the NRC. Under Commission regulations, violation of Section 210 of the ERA may result in imposition of a civil penalty.

Records in this system include enforcement actions taken against individuals, including Orders, Notices of Violations with and without Civil Penalties, Orders Imposing Civil Penalties, Letters, Demands for Information, responses to these actions, and any other enforcement actions taken by the NRC against individuals and documents directly related to those actions that have been issued. When considered appropriate for disciplinary purposes, information may be disclosed to a bar association, or other professional organization performing similar functions, including certification of individuals licensed by NRC or Agreement States to perform specified licensed activity. Information on actions taken by the NRC may be publicly disseminated in order to deter future violations. A report of this system of records, required by 5 U.S.C. 522(r), as implemented by OMB Circular A-130, has been sent to the Chairman, Committee on Government Operations, U.S. House of Representatives; the Chairman, Committee on Governmental Affairs, U.S. Senate; and the Office of Management and Budget.

1. The following new system of records, NRC-3, "Enforcement Actions Against Individuals," is being proposed for adoption by the NRC.

NRC-3

SYSTEM NAME:

Enforcement Actions Against Individuals—NRC.

SYSTEM LOCATION:

Primary system: Office of Enforcement, 11555 Rockville Pike, Rockville, Maryland.

Duplicate systems: Duplicate systems may exist, in whole or in part, in the enforcement coordinator's offices at NRC Regional Offices at the locations listed in Addendum I, part 2.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals involved in NRC licensed activities who have been subject to the NRC Enforcement Actions.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system consists of individual enforcement actions, including Orders, Notices of Violations with and without Civil Penalties, Orders Imposing Civil Penalties, Letters of Reprimand, and Demands for Information. Also included are responses to these actions. In addition, the files may contain other relevant documents directly related to those actions that have been issued. Files will be arranged numerically by Individual Action (IA) number, assigned as individual enforcement actions are issued. The system will include a computerized database with alphabetical and numerical indices, by names of the individuals subject to the action and IA numbers, respectively.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2114, 2167, 2201(c), 2236, and 2282 (1988).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Information in these records may be used:

(a) To respond to general information requests from the Congress;

(b) To deter future violations, information in this system of records may be routinely disseminated to the public by (1) publication in the **Federal Register** of each enforcement action issued to an individual; and (2) a listing of all individuals currently subject to an order that affects their participation in licensed activities and a copy of that order will be sent to all power reactor licensees twice a year and will be made available to other licensees and the general public on request;

(c) When considered appropriate for disciplinary purposes, to disclose information, such as a copy of an enforcement action and any hearing proceedings, to a bar association, or other professional organization performing similar functions, including certification of individuals licensed by NRC or Agreement States to perform specified licensing activity;

(d) To disclose information, such as a copy of an enforcement action and any hearing proceedings, concerning an individual to a Federal or State government agency with licensing

jurisdiction, where appropriate, to ensure the public health and safety; and

(e) For the routine uses specified in paragraph numbers 1, 2, 3, and 4 of the Prefatory Statement.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE

Records are maintained on paper in file folders, on computer printouts, and on computer disks.

RETRIEVABILITY:

Records are accessed by individual action file number or by the name of the individual.

SAFEGUARDS:

The files are maintained in file cabinets or a computer database. Access to and use of these records are limited to those NRC employees whose official duties require that access. These files are under visual control during duty hours.

RETENTION AND DISPOSAL:

The files are permanently retained for historical purposes and for later comparison with other cases to ensure consistency of application of enforcement policies.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

NOTIFICATION PROCEDURE:

Director, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

RECORD ACCESS PROCEDURES:

Same as "Notification Procedure."

CONTESTING RECORD PROCEDURES:

Same as "Notification Procedure."

RECORD SOURCE CATEGORIES:

Information in the records is primarily obtained from NRC inspectors and investigators and other NRC employees, including individuals to whom a record pertains, authorized representatives for these individuals, and NRC licensees, vendors, other individuals regulated by the NRC, and persons making allegations to the agency.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THIS ACT:

None.

Dated at Rockville, MD, this 29th day of July 1991.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 91-19223 Filed 8-14-91; 8:45 am]

BILLING CODE 7590-01-M

federal register

Thursday
August 15, 1991

Part III

Department of Education

Rehabilitation Services Administration

Protection and Advocacy of Individual Rights; Notice of final priority for Fiscal Year 1991

DEPARTMENT OF EDUCATION

Rehabilitation Services Administration

Protection and Advocacy of Individual Rights

AGENCY: Department of Education.

ACTION: Notice of Final Priority for Fiscal Year 1991.

SUMMARY: The Secretary of Education announces a final priority for fiscal year 1991 for grants to develop pilot projects to protect and advocate for the rights of individuals with severe disabilities who are receiving services under title VII of the Rehabilitation Act of 1973, as amended, (Act) and who are not eligible for services provided by existing protection and advocacy or ombudsman programs or whose request for services cannot be addressed by client assistance programs funded under section 112 of the Act.

EFFECTIVE DATES: This priority takes effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of this priority, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Thomas Finch, Office of Developmental Programs, Rehabilitation Services Administration, room 3319 Switzer Building, 400 Maryland Avenue, SW., Washington, DC 20202–2741. Telephone: (202) 732–1396. Deaf and hearing impaired individuals may call the Federal Dual Party Relay Service at 1–800–877–8339 (in the Washington, DC 202 area code, telephone 708–9300) between 8 a.m. and 7 p.m., Eastern time.

SUPPLEMENTARY INFORMATION: Section 731 (part D of title VII) of the Rehabilitation Act of 1973, as amended, authorizes grants to States to establish systems for the protection and advocacy of the rights of individuals with severe disabilities receiving services under title VII. The Secretary is conducting a competition for pilot projects to establish protection and advocacy programs for those individuals.

Eligible Applicants

An eligible applicant is the State through its governor. The governor shall designate a State agency to conduct the protection and advocacy system under section 731 of the Act that is independent of the designated State unit for vocational rehabilitation or any other agency that provides services under title VII of the Act.

On May 28, 1991 the Secretary published a notice of proposed priority for this program in the **Federal Register** (56 FR 24122). Four changes have been made since publication of the proposed priority.

Analysis of Comments and Changes

In response to the Secretary's invitation to comment in the notice of proposed priority, 18 parties submitted comments. An analysis of the comments and of the changes in the proposed priority follows.

Comments: Six commenters opposed limiting eligible applicants for the PAIR program to State agencies. Three commenters suggested that centers for independent living are the most appropriate entities to operate the PAIR projects and should not be excluded. In contrast, two commenters supported having the PAIR projects be independent from service providers under title VII of the Act.

Discussion: Section 731(a) of the Act requires the Department to "make grants to *States* to establish systems to protect and advocate for the rights of individuals with severe handicaps" [emphasis added] under this program. Therefore, only a State, through its governor, may apply for a grant under this program. However, the State agency designated by the governor to conduct the PAIR program may, in accordance with the Education Department General Administrative Regulations, award a subgrant or contract to a local public agency or private nonprofit agency or organization to operate the PAIR program, but only if the agency that receives the subgrant or contract does not receive any other funds under title VII of the Act.

Section 731(a) of the Act also requires that the PAIR system must be independent of any designated State unit that provides services under title VII to individuals receiving services under title VII. The legislative history of this provision (and its closely related counterpart, section 112) supports the view that Congress was concerned not only with the conflict of interest that exists when a designated State unit that has provided the services acts as the advocate for the individual who is dissatisfied with those services but also with the conflict of interest that exists when any agency that has provided the services acts as the advocate for the individual who is dissatisfied with those services.

Changes: None.

Comment: Three commenters requested that the priority clarify the definition of the designated State unit that provides services under title VII of the Act. Another commenter requested that the priority clarify whether or not the State agency that administratively houses the designated State unit that provides services under title VII, or another unit within that same State agency, can operate a PAIR project.

Discussion: The term "designated State unit" is defined in section 7(3) of the Act. The State must provide the Department with an assurance that the State agency conducting the PAIR project is independent of any designated State unit that provides services under title VII of the Act. Should a question arise as to the eligibility of any applicant under the PAIR program, eligibility will be determined on a case-by-case basis.

Changes: None.

Comment: One commenter recommended that the priority also prohibit the designation of a State employment agency to conduct the PAIR program in a State. Another commenter recommended that the governor designate a protection and advocacy agency or a client assistance program that is outside of the designated State unit that provides services under title VII of the Act to conduct the PAIR program.

Discussion: Section 731 of the Act states that the PAIR program must be independent from any designated State unit that provides services under title VII. There is no statutory basis for prohibiting a State employment agency from conducting the PAIR program. The Secretary believes that it would be inappropriate to suggest that a governor designate a particular agency or program to operate a PAIR project.

Changes: None.

Comment: Two commenters expressed concern regarding the delays and administrative issues inherent in subcontracting with a State agency to operate the program.

Discussion: Section 731 of the Act is clear that the State must be the grantee and does not allow for the direct funding of a nonprofit agency or organization outside of State government.

Changes: None.

Comment: Six commenters questioned the appropriateness of the eligibility requirements for services under the PAIR program. One commenter supported the proposed priority in limiting eligibility for PAIR services to those individuals with severe disabilities receiving services under title VII of the Act. Commenters also suggested that individuals who are seeking services under title VII or who are potentially eligible for title VII services should have access to PAIR program services.

One commenter recommended that the PAIR projects serve all disability groups, and another commenter suggested that individuals with traumatic brain injuries (TBI) and individuals with human immunodeficiency virus infection/acquired immunodeficiency syndrome (HIV/AIDS) be eligible for PAIR services.

Discussion: Section 731(a) of the Act clearly states that grants under the PAIR program must ensure the protection of the rights of "individuals *receiving* services" [emphasis added] under title VII. Congress could have, as it did quite clearly and specifically in section 112(a) of the Act authorizing the client assistance program, included "client applicants" within the population eligible for services under the PAIR program. However, it did not. Accordingly, the proposed priority limits eligibility for PAIR services only to those individuals with severe disabilities receiving services under title VII of the Act. In addition, services funded under the PAIR program must be available equally to all disability groups, including individuals with TBI and HIV/AIDS who are receiving services under title VII of the Act, and cannot be limited to individuals with a specific type or types of severe disability.

Changes: None.

Comment: Two commenters questioned the use of funds for protection and advocacy services because they believe the funding for programs to provide independent living services to individuals with severe handicaps is inadequate to address the need. Two other commenters questioned whether this program is necessary since Client Assistance Programs already provide assistance to individuals receiving services under title VII of the Act, and complaint processes already exist under both the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. Six commenters supported the priority and stated that this program will address a significant need in the States.

Discussion: Congress specifically appropriated funds for the PAIR program for fiscal year 1991. These funds may not be used for other purposes. The priority clearly states that the PAIR projects must provide services to individuals whose request for protection and advocacy services cannot be addressed by Client Assistance Programs.

Changes: None.

Comment: A commenter suggested that the PAIR projects be consumer-controlled and that each be required to establish a board having a majority of individuals with disabilities. Another commenter suggested that each PAIR project establish an advisory committee composed of a majority of individuals with severe disabilities or their families or guardians.

Discussion: The Secretary agrees that consumer involvement is an important aspect that will enhance the effectiveness of the PAIR projects. However, as these projects will be pilot demonstrations, the Secretary does not want to prescribe a specific mechanism for consumer input, but is interested in evaluating the effectiveness of various mechanisms for consumer involvement.

Changes: The priority has been revised to require an assurance that the applicant will involve individuals with severe disabilities in the development and implementation of these pilot projects.

Comment: Two commenters questioned the requirement for these projects to be statewide and comprehensive in scope. These commenters also suggested that the projects be allowed to establish priorities for services. One commenter requested that the priorities be established with client input. Another commenter suggested that the PAIR projects focus on services in rural areas.

Discussion: The Secretary agrees that it would be difficult to operate a statewide program in larger States based on the limited funds available for the PAIR projects. In addition, since these projects will be pilot demonstrations, it is not necessary for the projects to be statewide and comprehensive in scope. The Secretary does not want to prescribe any particular issue or focus for the projects, such as services in rural areas. The PAIR projects can determine the selected issue or issues to be addressed based upon the need in the State. However, this does not mean that a project funded under the PAIR program may deny protection and advocacy services to an individual based on the type or types of severe disability.

Changes: The requirement for these projects to be statewide has been eliminated. In addition, the priority has been revised to allow projects to give priority to selected issues (e.g., housing or employment).

Comment: One commenter stated that it was confusing to require the PAIR projects to coordinate with and not duplicate the investigative and conciliation services funded under the Fair Housing Amendments Act of 1988. In addition, the commenter suggested that the priority clarify that the PAIR projects can provide protection and advocacy services to address complaints arising under section 504 of the Act. Three commenters supported the requirement that these projects coordinate with other existing systems.

Discussion: The Secretary believes that the priority clearly states that the PAIR projects must build upon existing systems to carry out activities not already funded by other sources or to serve individuals not already served by other programs. The priority also clearly states that these pilot projects must assist individuals in pursuing remedies under the Rehabilitation Act of 1973, as amended, which would include remedies under section 504.

Changes: None.

Comment: One commenter questioned the requirement that the PAIR projects utilize mediation to the maximum extent feasible prior to resorting to administrative or legal remedies. The commenter suggested that the priority be revised to require the use of various dispute resolution techniques instead of mediation. Another commenter supported the use of mediation.

Discussion: The Secretary agrees that the use of various dispute resolution techniques prior to resorting to administrative or legal remedies is appropriate for the PAIR program.

Changes: The priority has been revised to state that assurance must be given that the PAIR program will utilize alternative dispute resolution techniques before proceeding to administrative or legal remedies.

Comment: One commenter supported the requirement for a self-evaluation of the project, but suggested that it would be helpful to require that the evaluation include an assessment of the extent of independent living services in the State and the ability of those services to meet the needs of citizens in the State who might be eligible for and require such services.

Discussion: Section 731 of the Act provides no authority to require a grantee under the PAIR program to assess the extent and adequacy of independent living services in the State. Furthermore, the State Councils for Independent Living, mandated under section 706(a) of the Act, are required to develop five-year plans that include assessments of the need for independent living services within each State and recommendations for the development of new services and programs.

Changes: None.

Comment: One commenter suggested that the priority require PAIR projects to provide interpreter services for individuals who are deaf.

Discussion: All federally-funded programs must adhere to the

requirements of section 504 of the Act and not deny services to any individual with a handicap who is otherwise eligible for such services. Section 504 requires that PAIR projects have available interpreters or other mechanisms to make their services available to individuals who are deaf or hearing impaired.

Changes: None.

Comment: One commenter stated that information on the amount of funds available and expected number of projects to be funded would be helpful in developing applications for this program.

Discussion: This information is contained in the notice inviting applications for new awards for fiscal year 1991, published in the **Federal Register** on July 19, 1991.

Changes: None.

Priority

In accordance with the Education Department General Administrative Regulations (EDGAR), 34 CFR 75.105(c)(3), the Secretary proposes to set aside funds and give an absolute preference to applications that respond to the final priority described in this notice for fiscal year 1991. An absolute priority is one that permits the Secretary to select for funding only those applications proposing pilot projects that meet the priority.

A State shall provide the Secretary with assurances that projects established with grants made under section 731 of the Act will have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of individuals with severe disabilities receiving services under title VII of the Rehabilitation Act within the State. A State shall assure that a protection and advocacy system funded under section 731 of the Act will be independent of any designated State unit that provides services under title VII of the Act to those individuals. A State shall also assure that the agency designated to conduct the protection and advocacy system under section 731 of the Act will utilize alternative dispute resolution techniques to the maximum extent feasible prior to resorting to administrative or legal remedies. A State shall assure that the designated agency will involve individuals with severe disabilities in the development and implementation of the protection and advocacy system.

To prevent duplication of services, the State shall assure that the agency designated to conduct this program has knowledge of the eligibility requirements and the range of services provided by the following programs and will coordinate, as appropriate, with—

(1) The system to protect and advocate for the rights of individuals with developmental disabilities required under the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1978;

(2) The system to protect and advocate for the rights of mentally ill individuals required under the Protection and Advocacy for Mentally Ill Individuals Act of 1986;

(3) The system to provide ombudsman services on behalf of individuals receiving long-term care required under the Older Americans Act;

(4) The client assistance program required under section 112 of the Rehabilitation Act of 1973, as amended;

(5) The advocacy services provided by centers for independent living within the State; and

(6) The investigative and conciliation services funded under the Fair Housing Amendments Act of 1988.

Priority will be given to pilot projects that will protect and advocate for the rights of individuals with severe disabilities who are receiving services under title VII of the Rehabilitation Act of 1973, as amended, and who are not eligible for services provided by existing protection and advocacy or ombudsman programs or whose request for services cannot be addressed by client assistance programs funded under section 112 of the Act. "Individual with severe disabilities" means an individual whose ability to function independently in family or community or to engage or continue in employment is so limited by the severity of his or her physical or mental disability that independent living rehabilitation services are required for the individual to achieve a greater level of independence in functioning in family or community or engaging or continuing in employment.

Projects funded under this priority must—(1) Provide protection and advocacy services to individuals with severe disabilities receiving independent living services under title VII of the Rehabilitation Act to ensure the protection of their rights under the Rehabilitation Act and, to the extent necessary to achieve their independent living goals, the Fair Housing Amendments Act of 1988, the Americans with Disabilities Act of 1990, and other applicable Federal, State, and local laws; (2) Engage in cooperative activities with relevant public and private agencies and organizations to address barriers that prevent these individuals from achieving their independent living goals; and (3) Conduct a self-evaluation to assist the Secretary in determining the effectiveness of the pilot demonstration projects and the future directions and scope of Federal funding of protection and advocacy services for individuals with severe disabilities.

Projects funded under this priority must build upon existing systems to carry out activities not already funded by other sources or to serve individuals not already served by other programs. Projects may establish a priority for services based upon selected issues.

The applicant shall describe how the project will inform individuals with severe disabilities of their rights and will assist those individuals in pursuing remedies under the Rehabilitation Act of 1973, as amended, the Fair Housing Amendments Act of 1988, and the Americans with Disabilities Act of 1990.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

(Catalog of Federal Domestic Assistance No. 84.240, Protection and Advocacy of Individual Rights)

Authority: 29 U.S.C. 796g

Dated: August 6, 1991.

Lamar Alexander,

Secretary of Education.

[FR Doc. 91-19416 Filed 8-14-91; 8:45 am]

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federal register

Thursday
August 15, 1991

Part IV

National Indian Gaming Commission

25 CFR Chapter III

Annual Fees Payable By Class II Gaming Operations; Rule

Fee Rates; Notice

NATIONAL INDIAN GAMING COMMISSION

25 CFR Chapter III

Annual Fees Payable By Class II Gaming Operations

AGENCY: National Indian Gaming Commission.

ACTION: Final rule.

SUMMARY: The National Indian Gaming Commission is establishing this rule in chapter III in Title 25 of the Code of Federal Regulations (Parts 500–599). This rule provides direction and guidance to Class II gaming operations (activities) to enable them to compute and pay the annual fees as authorized by the Indian Gaming Regulatory Act (IGRA) beginning with the third quarter of calendar year 1991. The computation and payment of annual fees are to be self-administered by each Class II gaming operation that is subject to the jurisdiction of the Commission.

The proposed rule was published in Part VI of the **Federal Register** on May 29, 1991. The 30-day comment period ended on June 28, 1991.

EFFECTIVE DATE: September 16, 1991.

FOR FURTHER INFORMATION CONTACT: Fred W. Stuckwisch, National Indian Gaming Commission, 1850 M Street, NW., Suite 250, Washington, DC 20036; telephone 202/632–7003; fax 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act (IGRA), enacted on October 17, 1988, established the National Indian Gaming Commission (Commission). The Commission is charged with, among other things, regulating Class II gaming on Indian lands. These regulations are issued pursuant to the IGRA.

Purpose

The purpose of these regulations is to carry out those portions of the IGRA that provide for the payment of fees by Class II gaming operations and for the collection and use of such fees by the Commission. Gaming operations are the economic entities licensed by a tribe that operate the games, receive the revenues, issue the prizes, and pay the expenses. Gaming operations may be operated by a tribe directly, by a management contractor, or under certain conditions, by an individual owner/operator.

Starting Date

This rule will become effective for the second half of calendar year 1991 which means that all Class II gaming operations within the jurisdiction of the Commission must begin self-administering the provisions of these regulations and must begin reporting and paying any fees that are due to the Commission at the end of the third quarter of 1991 (Sept. 30).

System Self-Administered

These regulations provide for a system of fee assessment and payment that is self-administered by the Class II gaming operations. Briefly, the Commission adopts and communicates the assessment rates; the gaming operations apply those rates to their revenues, compute the fees to be paid, and report and remit the fees to the Commission quarterly.

Fees Based on Assessable Gross Revenues

Annual fees are payable quarterly each calendar year based on the previous calendar year's assessable gross revenues from the Class II gaming operations. For this purpose, all revenues from gaming operations determined by the licensing tribe to be Class II are included. This has been added to the final regulations as § 514.1(b)(4).

Adoption of Fee Rates

The Commission will adopt preliminary annual fee rate(s) during the first quarter of each calendar year and final annual fee rate(s) for that year during the fourth quarter. Separate rates may be set for assessable gross revenues of $1,500,000 (1st tier) and for revenues over $1,500,000 (2nd tier). It is the present intent of the Commission, but not a requirement, that if different preliminary rates are used for each tier, the final rates will bear the same relationship to each other as the preliminary rates adopted earlier that year. When adopted, the Commission will publish the rates in the **Federal Register** as a Notice.

Fee Rates for Current Year

The Commission has adopted a single preliminary fee rate of 1% for use beginning with the third quarter (July 1–Sept. 30) of the current calendar year (1991). The Commission may change this rate during the fourth quarter when more information about the assessable gross revenue base becomes available. The last or final rate adopted will ultimately determine the amount of fees paid during the year. The Commission is publishing a Notice announcing this preliminary rate simultaneously with these regulations in the **Federal Register**.

Self-Regulation

If a tribe has a certificate of self-regulation, the rate of fees imposed shall be no more than .25 percent of gross revenues from self-regulated gaming operations. Later rulemakings will add the requirements for obtaining a certificate of self-regulation.

Reports and Payments

Gaming operations compute their fee payments by applying the rates adopted to their assessable gross revenues from the preceding calendar year. Gaming operations report their assessable gross revenues, fees, and calculations to the Commission with their quarterly payments. Payments and reports are due no later than March 31, June 30, September 30, and December 31, of each calendar year, beginning in September, 1991.

Computations

Briefly, the computations required for each quarter are:

(1) Multiply the previous calendar year's 1st tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(2) Multiply the previous calendar year's 2nd tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(3) Add (total) the results (products) obtained in steps (1) and (2) above.

(4) Multiply the total in (3) by the fraction representing the applicable quarter: 1st quarter—¼; 2nd quarter—½ (2/4); 3rd quarter—¾; and 4th quarter—1 (4/4).

For 1991, the quarter ending September 30, 1991 will be the first quarter. The quarter ending December 31, will be the second quarter. There will be no third or fourth quarter.

(5) Subtract the amounts already paid by the operation for the current year and credits, if any, due for any previous year's overpayment from the amount determined in (4). (The Commission will compute and tell the gaming operations the amounts of deductible "credits.")

(6) The gaming operation should pay the amount computed in (5) for the quarter.

Examples

The regulations include examples of the computations at § 514.1(b)(3) and (c)(7). Example 3 in § 514.1(b)(3) applies to 1991 only.

Use of Adjusted Numbers

Basing the fees on the previous year's assessable gross revenues provides enough time to the gaming operations to finalize and submit adjusted numbers

before the end of the third quarter of the calendar year. Furthermore, the use of preliminary and final rates by the Commission provides enough time for the Commission to determine the assessable gross revenue base before finalizing the rates for each calendar year.

Applicability

These regulations apply to all Class II gaming operations under the jurisdiction of the Commission. New gaming operations (with no gaming revenues generated in the previous calendar year) must file reports quarterly although no fees will be due.

Penalties and Interest

Penalties and interest may apply for failures to file quarterly statements and to pay fees when due. The Commission may withhold, deny or revoke required approvals for failures to pay fees, penalties and interest. Future rulemakings will add procedures for taking and appealing such adverse actions.

Public Comments and Responses

The Commission received more than fifty separate communications about the proposed rule during the 30 day comment period. Some were from individuals and organizations while others were from groups representing individuals or organizations. Represented by these communications were tribes, gaming associations, a tribal chairmen association, an inter-tribal council, a gaming management company, federal agencies, individuals, and others. The comments ranged from simple requests for more time to comment, to objections to paying fees at all, to comprehensive analyses of the contents of the proposed rule. The Commission has thoroughly considered these comments and its decisions are set forth in the paragraphs that follow.

The Commission has made one major change in response to the comments received: For 1991, it will assess fees beginning with the third quarter. That is, the preliminary rate will be 1% but the assessment will apply only to the last two quarters of the calendar year.

The comments received fall into two groups—those dealing with specifics of the proposed regulations and those dealing with policy/process issues.

Proposed Regulations

This first set of comments relates more directly to the regulations proposed.

Retroactive Fee Assessments

Several commenters feel the fee assessment rules are retroactive, apparently based on two factors: First, the use of the previous year's revenues to compute the current year's fees, and second, the assessment of a full year's fees for calendar year 1991. Among other things, commenters argue that tribes and gaming operations are not prepared to pay these fees.

Responses: First, the use of the previous year's revenues is not retroactive application. The Commission is merely trying to lessen the extra burden on tribes and gaming operations required to report current year assessable gross revenues before any audit work could be done. Furthermore, the Commission needs good, timely information to set rates.

Second, the Indian Gaming Regulatory Act (IGRA), enacted in October 1988, requires the assessment of fees. Tribes and gaming operations have been on notice since then that they must pay these fees. The Commission therefore rejects the argument for notice.

The Commission is sympathetic to the view that the fee assessments should begin only after the Commission was constituted. The third member of the Commission was sworn in on April 10, 1991 and these rules were proposed on May 28, 1991. The Commission has therefore decided to change the rule as proposed and make it effective beginning with the second half of calendar year 1991. This means that operations must pay fees for the third and fourth quarters of 1991 only. The rules now reflect this decision. The third calendar quarter will be the first fee assessment quarter and the fourth calendar quarter will be the second and final fee assessment quarter for 1991.

Assessable Gross Revenues

Two commenters felt that the Commission should clarify the definition of assessable gross revenues to read "the total amounts of money wagered in class II gaming, less * * *."

Response: The Commission agrees that this is the intended meaning of this provision and is changing the rule accordingly.

One commenter suggested that the definition should include amounts anted where amounts wagered are not known.

Response: The Commission agrees that antes (when collected by the house) are a form of admission fees and are to be included in assessable gross revenues. § 514.1(b) of the regulations has been changed to make clear that admission fees and assessable gross revenues includes table or card fees.

Two commenters asked the Commission to define revenues not included in assessable gross revenues.

Response: Revenues derived from non-gaming activities are not included in assessable gross revenues. These include food, beverages, parking, etc. The Commission does not believe however that such a definition belongs in the regulations.

One commenter believes that the definition of "gross" does not consider percentage management contract payments; it places the Tribes in a position of paying a tax on income they never receive.

Response: This comment suggests there may be some confusion about the respective responsibilities of the tribes and the gaming operations. The gaming operations receive the assessable gross revenues and should be the payers of the fee assessments. The gaming operations make the "percentage management contract payments" to the tribe from the net revenues of the gaming operation. Rather than paying a "tax" on income they never receive, the income the tribes receive is net of fees paid.

One commenter suggested that assessable gross revenues should exclude taxes assessed at the time of entry or purchase of a bingo package and paid to the tribe.

Response: The Commission disagrees. The tribe, not some outside independent entity, imposed the taxes. This practice increases the gross but labeling it a tax doesn't exclude it from assessable gross revenues. It remains an amount paid for wagering. Moreover, the definition of gross revenues in the IGRA does not authorize the exclusion of such tribal tax from assessable gross revenues.

Three commenters stated that the assessable gross revenue base should exclude the cost of bussing.

Response: The cost of bussing is an operating expense. And whether paid for with cash or in kind (e.g., bingo packages) it remains an operating expense. The only deductible operating expense authorized by the IGRA is an allowance for the amortization of structures.

One commenter feels that the definition of assessable gross revenues should allow the deduction of many operating expenses.

Response: The only deductible operating expense provided by the IGRA is the allowance for the amortization of structures.

Total Fees Assessed

Some commenters expressed concern about the total amount of funds the

Commission might collect and what the Commission might do with any excess. One commenter suggested that the regulations specifically provide that the limitation be a factor considered in setting rates:

> The Commission shall, to the best of its ability, set the level of rates such that the total amount of all fees imposed by the Commission shall not exceed $1.5 million during any fiscal year.

Other commenters argued that the retention of excess fees is unfair to the tribes; some called for the payment of interest while others called for refunds. One noted that the refund formula is unclear.

Response: The proposed rule provides a mechanism for setting interim and final rates to meet the target or limitation ($1.5 million) for the year with relative ease. First, the mechanism provides gaming operations with nine months to finalize the assessable gross revenue base and report the amounts to the Commission. Next, it provides the Commission time to compute and set the final rate required to produce the amount targeted within the limitation. As a result, the payments through the final quarter should produce the amount targeted. The Commission will credit the accounts of all gaming operations with their pro-rata share of any excess funds received. The Commission has the mechanism to compute and collect the amount of fees targeted (within the limitation) and does not intend to collect more that it needs. However, because estimates will change and because rounding of rates will affect the amounts collected, the rule provides for crediting any excess collections.

Notice

One commenter suggested that the Commission notify tribes about the annual fee rate at least 60 days in advance.

Response: The Commission will notify the tribes as much in advance as possible as to changes in the annual fee rate. Only when the Commission receives the information it needs about changes in the assessable gross revenue base can it determine what changes to the rates are necessary.

Fee Rate

One commenter suggested that the regulations include the fee rates.

Response: It is not practical to include the fee rate in the regulations because every change to the fee rates would require changes in the regulations. It is a more costly and time consuming process to amend the regulations than issue a Notice. Furthermore, the Commission can communicate its fee rate decisions more quickly using a notice.

Another commenter suggested that the fee rate be set annually "as provided in the Indian Gaming Regulatory Act" (IGRA), not quarterly.

Response: The Commission will annually adopt an annual rate of fees for each calendar year. Additionally, the Commission will set interim rates to facilitate the quarterly collection. The purpose of this is to avoid any sizable overpayment or underpayment of fees that would require significant adjustments.

Self-Regulators

Commenters have suggested that the Commission clarify the fee rule for self-regulating tribes and have asked about the mechanism for collecting or paying reduced fees.

Response: Section 514.1(a)(5) provides that if a tribe has a certificate of self regulation, the rate of fees imposed shall be no more than .25 percent of assessable gross revenues. All eligible operations would substitute the .25 percent for the rate set by the Commission if that rate is higher than the .25 percent limit.

1% Preliminary Fee Rate

One commenter asked the Commission to explain the 1% preliminary fee rate.

Response: The fee rate was set at 1% because (l) that rate is within the ranges authorized by the IGRA, and (2) that rate could produce fees of approximately $1,500,000, on an annual basis.

Effective Date for Tribes With Certificates of Self-Regulation

Commenters suggested that tribes receiving certificates of self-regulation immediately receive the lower fee rate.

Response: The Commission provided for annual effective dates because the regulatory work that must be planned and budgeted in advance—either by the Commission or the tribe—cannot be changed quickly without some disruption to both parties. The Commission has decided to delete the effective date provision now and will consider the question further in connection with the publication of the rules for self-regulation.

Determination of Fee Rate

One commenter suggested that the Commission establish and publish a procedure for the Commission to determine/set the fee rate to provide certainty to gaming operators and a sound basis for the Commission's decisions.

Response: The IGRA did not provide for, and the Commission rejects the suggestion that, a formula or fixed set of criteria is necessary to determine the rates. The IGRA anticipated that the Commission would, and the Commission intends to, exercise its judgment in setting the rates within the ranges stated. The rate for the current year is being set within the ranges stated to produce annualized revenues of $1,500,000.

Fee Basis

One commenter suggested that the Commission use the previous fiscal year's audited financial statement, not the previous calendar year's assessable gross revenues, to compute the fees.

Response: The use of the previous fiscal year's audited financial statements as the basis for assessing fees would result in using different fiscal periods for assessing different operations because tribes and gaming operations use the several different years. The Commission has decided not to make a change.

Discounts

One commenter suggested that admissions revenue should be net of discounts.

Response: The Commission agrees that admissions revenue should be net of true discounts. For example, where a player receives a $30 package for $25 in connection with some promotion. However, if the operation exchanges a $30 package with someone for services and that someone resells the package to a player, the value of that package belongs in assessable gross revenues.

Jackpot Prize Accounts

A commenter believes that funds collected in Jackpot prize accounts do not belong in revenue—that they belong to the winning player.

Response: The proper treatment of amounts collected in jackpot prize accounts depends in part on whether the tribe and gaming operation are using cash basis or accrual basis accounting. With cash basis accounting, the prizes are deducted when they are paid out. With accrual basis accounting, the prizes are deducted when the liability is established. In neither case should more than the actual liability be deducted. Regardless of the method used, there should be a proper matching of revenues and expenses.

Prizes

One commenter suggested that the cost of prizes awarded include administrative costs.

Response: The Commission disagrees with the suggestion because such costs are operating expenses for which IGRA provides no allowance.

One commenter suggested that the calculation of fees for prizes paid to players should be on an accrual basis.

Response: The Commission agrees provided all the gaming operation's accounting is done on the accrual basis.

Structures

Some commenters feel that structures should include other items such as furniture and equipment.

Response: The Commission disagrees. There is little similarity in that the estimated useful lives of such items are much less than those of structures.

Several commenters contend that generally accepted accounting principles, not the 5% limit, should govern the allowance for amortization.

Response: Generally accepted accounting principles govern the accounting for the gaming operations and for computing assessable gross revenues for fee assessment purposes with this exception: For fee assessment purposes only, limits apply to the allowance for amortization of structures. This is to provide more even treatment to the various gaming operations because if one operation can pay less because of something unique to its computation (such as an exorbitant amount for amortization), all the other operations must pay more if the total amount assessed is to remain the same.

One commenter contends that the amortization period for structures should not exceed the length of the management contract.

Response: The Commission disagrees. While this may be a very conservative approach, it does not provide a very good matching of costs and revenues.

Commenters asked that the term "structures" and "cost of structures" be further defined.

Response: The Commission does not believe that these terms need to be further defined in the regulations. They are commonly used terms, not unique to the IGRA. Structures are usually the buildings that house the gaming operations; structures could include separate buildings that house, for example, the heating and air conditioning plant or a parking garage that serves the gaming operation. Structures usually last 25, 50, or more years. The cost of structures includes the purchase price or the cost of construction as well as the cost of any additions or improvements. It does not include the cost of the land on which the structure is constructed.

One commenter felt that the 5% and 2.5% limitations need to be further explained.

Response: These limitations assure that the amounts of amortization deducted are reasonable and that all gaming operations pay a relatively reasonable amount of the total fees assessed gaming operations. That is, gaming operations that haven't invested heavily in structures aren't unreasonably penalized.

One commenter asked "Will amortization be allowed as a deduction against the proposed fees for those years the structures were in use prior to the effective date of the proposed rule?"

Response: If this means: will amortization already taken in prior years be allowed again as a deduction in determining assessable gross revenues? The answer is no. Structures should be depreciated or amortized according to generally accepted accounting principles and the amount of such amortization should be deducted in arriving at assessable gross revenues, subject to the 2.5% and 5% limitations.

Operating Costs

One commenter noted that the fee assessment formula does not properly consider operating costs.

Response: The fee assessment formula excludes operating costs (except amortization of structures) in the computation of assessable gross revenues, as provided for in the IGRA.

Grandfathered, Individually Owned, Class II Gaming Operations

One commenter expressed concern because the fees assessed will be operating expenses of the gaming operation and the tribe will receive less because the tribe's income comes from net revenues.

Response: The commenter is correct in that the fees will become operating expenses of the gaming operation and, without any other change in the relationship between the tribe and the gaming operation, the tribe will receive less.

Licensed, Individually Owned, Class II Gaming Operations

One commenter pointed out that the regulations should include licensed, individually owned, class II gaming operations.

Response: The Commission agrees and is changing its definition to include all individually owned gaming operations.

Responsibility for Fee Payments

One commenter suggested that the Commission clarify who is responsible for making the fee payments and if it is someone other than the Tribe, provide that the Tribe be notified.

Response: The first sentence of the regulations states "Each class II gaming operation under the jurisdiction of the Commission shall pay to the Commission annual fees as established by the Commission." And as noted in the preamble, gaming operations are the economic entities licensed by a tribe, that operate the games, receive the revenues, issue the prizes, and pay the expenses. As to notification, this should be part of the operating agreement between the tribe and its licensee, the gaming operation.

Another commenter noted that individual operations "grandfathered" by the IGRA should not be directly accountable to the Commission, but rather, should be accountable through their respective tribal governments.

Response: The fact that gaming operations pay fees directly to the Commission does not make them directly accountable to the Commission on all matters. The structure of Indian gaming as provided by the IGRA might best be pictured as concentric circles that have at their center the gaming operations surrounded by the tribe as the licenser, regulator, etc., and then by the Commission. The tribe has control over, and primary responsibility for, the gaming operations.

One commenter felt it would be a better procedure for the Commission to issue bills quarterly to the tribe or operator, as appropriate.

Response: The Commission considered this approach but rejected it because it is not as efficient. It is the gaming operation, not the Commission, that has the information necessary to compute the amount of fees due. To have the gaming operations report the information to the Commission and then have the Commission compute the amounts due and bill the gaming operations would require more time and be more costly.

Quarterly Reports

One commenter thinks the revenues should be reported quarterly by the end of the following quarter and separate from the quarterly payments of fees.

Response: At some point it might be desirable for the Commission to collect revenue information quarterly and on a much more current basis. For now, and for this rule, the Commission has decided to obtain only the annual revenue information.

Another commenter suggested that the gaming operations provide copies of the quarterly statements and

communications concerning fees to the tribal gaming commissions for informational purposes.

Response: The Commission agrees but does not believe it belongs in these regulations. The agreement between the tribe and the gaming operation should cover this.

Form

Responding to the Commission's question whether it should provide a form, several commenters said yes, a form would insure uniformity and continuity for remittances and reports. One commenter wants forms for the first payment due in 1991.

Response: The Commission is considering the use of a form for reports and payments beginning with calendar year 1992. The Commission would like to first receive and review the required information before committing to designing and providing a form for this purpose.

Submission/Due Dates for Reports and Payments

One commenter observed that the submission dates for reports and payments need revision because the final rule will be published during the third or fourth quarter of calendar year 1991. Another said that the effective date is not clear.

Response: The rule will be final 30 days from the date of publication in the **Federal Register**. The first report will be due on the next due date after publication. For example, if published on August 30, 1991, the rule will be effective on September 29, 1991, and the first report and payment will be due on September 30, 1991. As noted above, the fee computation formula has been changed. Fees will be collected for only one-half year.

One commenter suggested that the regulations provide for extensions of time to file.

Response: The Commission believes that the need for extensions should be minimal and will deal with such requests on a case-by-case basis.

One commenter argued that items should only be postmarked or delivered by the due dates, not received.

Response: The Commission disagrees. It expects to receive all items by their due dates.

Protection of Information

Several commenters noted that the regulations provide no protection for the confidential and proprietary information provided by the tribes. One commenter suggests including:

> The quarterly financial statements filed by any tribe shall be considered to be confidential commercial or financial information and shall not be disclosed to any person.

Response: The IGRA provides that "* * * the Commission shall preserve any and all information received pursuant to this Act as confidential * * *." (25 U.S.C. § 2716(a)) The Commission is bound by this provision, whether or not included in the regulations.

Penalties

One commenter suggested that the regulations clarify to whom the penalty provisions for failure to file and pay apply; and whether the tribe can be penalized for the licensee's or operator's failures.

Response: As noted above, the fact that gaming operations are to pay fees directly to the Commission does not make them directly accountable to the Commission on all matters. The structure of Indian gaming as provided by the IGRA might be pictured as concentric circles that have at their center the gaming operations surrounded by the tribe as the licenser, regulator, etc. and then by the Commission. The tribe has control over, and primary responsibility for, the gaming operations. The Commission will look first to the gaming operation for the filing of reports and the payment of fees. However, it also will look, simultaneously or ultimately, to the tribe for these same items.

This same commenter contends that operators who fail to file or pay should be suspended from participating in any gaming operations with tribes until all obligations are satisfied.

Response: The Commission is not necessarily opposed to such a penalty provision but wants to consider the suggestion more thoroughly before it proposes its penalty provisions.

Another commenter asked the Commission to make clear that penalties for failure to pay class II fees will affect only class II gaming operations.

Response: The Commission is not prepared to make such an assertion at this time. The Commission may consider this comment as part of its penalty and enforcement regulations.

One commenter "assumes that by allowing a tribe to pay 4/4 of the assessment in the fourth quarter means penalties will not be imposed on a tribe for failing to pay during the course of the year the fee becomes due."

Response: The assumption is wrong. The regulations do not allow a tribe or anyone else to pay 4/4 of the assessment in the fourth quarter. The fraction 4/4 is one of several factors used to compute the amount due for the fourth quarter. Similar factors are used in earlier quarters to compute amounts due then.

Class II Revenues Only

Two commenters asked that the regulations clarify that the fee assessments apply to class II revenues only.

Response: There are many references to class II in the proposed rule. For example, the first sentence of the regulations begins "Each class II gaming operation under the jurisdiction of the Commission shall pay to the Commission annual fees * * *" References to class II have been added to § 514.1 (a)(4)(ii), (a)(5), (b), and (c)(1).

Class II v. *Class III*

One commenter contends that

> The proposed regulations call for the Tribe to determine whether a specific gaming operation is "Class II." A Tribe may be motivated to define "Class II" narrowly in the context of fee assessments * * * However, in the context of tribal/state compact negotiations, the Tribe may be motivated to define "Class II" expansively * * * A Tribe should not have its hands tied by whether or not fees were paid to the National Commission, in its negotiations with the state.

Response: The Commission cannot agree that certain games should be treated as class II for state/tribal compact negotiation purposes and class III for fee assessment purposes.

Combined Class II and Class III Operations

One commenter noted that the proposed regulations fail to provide guidance on apportionment between class II and class III gaming.

Response: The commenter is correct. The subject may be dealt with later when the Commission determines whether combined class II and class III operations are appropriate. The subject of apportionment goes far beyond the needs of these regulations. For these regulations and at this time, generally accepted accounting principles should be used to allocate the value of prizes, amortization, and revenues.

Policy/Process Issues

This next group of comments deals with policy/process issues as opposed to the contents of the rule itself. Some of the issues raised were dealt with specifically by Congress in the IGRA while others are left to the discretion of the Commission.

Public Hearings/Consultations

Several commenters expressed concern about the lack of tribal input

and some called for public hearings and consultations.

Response: The Commission determined that the comment period provided enough opportunity for public input, that public hearings/consultations were unnecessary for this proposed rule. The Commission wants interested parties to know however that public hearings will be held in connection with many of the rules to be proposed in the future.

Notification

One commenter said that giving notice to the Tribes by using only the **Federal Register** notice is inadequate—that Tribes should be notified directly.

Response: The **Federal Register** publication system was established by Congress to inform the public of regulations affecting them. Publication in the **Federal Register** provides official notice of a document's existence and its content. In addition to publication in the **Federal Register**, the Commission sent copies of this proposed regulation to Tribes directly. The Commission intends to continue to send copies of proposed and final regulations to the Tribes and gaming operations directly but such communications cannot be relied upon as the official notice.

Comment Period Extension

Many commenters asked for an extension of the comment period.

Response: The Commission considered these requests very seriously but after much deliberation, decided not to extend the period because:

—Numerous thoughtful, substantive comments were received during the comment period provided,
—No new concerns about the proposed rules were presented in the requests to extend the comment period, and
—The Commission must begin collecting fees to carry out its statutory requirements and purposes.

Implementation

A number of commenters oppose implementation and/or propose a moratorium.

Response: As noted elsewhere, IGRA requires the Commission to collect fees to carry out its statutory requirements and purposes. The proposed rule provides the method and means for doing this.

Adequate Advance Notice

Commenters have suggested that adequate notice should be given and that retroactive implementation may not allow some tribes to adopt regulations or ordinances to allow them to comply.

Response: The Congress enacted the IGRA in October, 1988. The Commission proposed the rule implementing the provision in the IGRA in May, 1991, and the final rule will become effective 30 days after publication in the Federal Register. Those subject to the provisions of the IGRA have been on notice as to the fee requirements since 1988. As noted above, the regulations now provide assessments beginning July 1, 1991.

Re-propose the Rule

One commenter has suggested that the Commission re-issue the proposed rules considering the comments received and with additional provisions (e.g., appeals) included.

Response: The Commission has determined that the rule changes in response to the comments are favorable to the regulated or minor and do not warrant a re-issue of the proposed rules. As explained elsewhere, the Commission has determined that it must issue these rules now to begin collecting fees to carry out its statutory requirements and purposes.

Objections to Assessments

Many commenters have objected to the Commission assessing the Tribes and gaming operations. One commenter feels that the fees are a further unwarranted slap at Tribal attempts to become self-sufficient. Another commenter feels that fees should be assessed only on operations that have a volume in excess of a million dollars wagered per year for class II and otherwise imposed only on class III operations. Yet another commenter suggests an exemption or exception for charity-type bingo operators.

Response: The IGRA requires that the Commission assess all class II gaming operations. The Commission does not have the discretion not to collect fees from such operations.

Anticipated Fee Rate

Some commenters feel that the anticipated 1% fee is excessive or unfair. One commenter feels that gaming operations should not be assessed at rates different from other operations in the state. Other commenters have suggested the use of other rates or combinations of rates.

Response: The IGRA requires the Commission to establish a schedule of fees to be paid to the Commission annually by each class II gaming operation. IGRA further requires that the rate (singular) of the fees imposed under the schedule shall be between 0.5% and 2.5% on the first $1,500,000 and no more than 5% on amounts in excess of $1,500,000. The IGRA does not provide for multiple rates within each of the two tiers.

Formula

Some commenters feel that the formula does not properly consider the effects of the fees on governmental services, net revenues as a basis for assessment, development costs, or the assessment of losing games. One commenter feels the definition of "gross" places a strain on the tribal budget.

Response: The IGRA provides for the assessment of gross revenues as defined thus making it impossible to treat each of these groups of gaming operations differently.

Amortization of Structures

One commenter feels that the regulations penalize tribes that have not expanded through new construction or the expansion of their existing facilities because they do not get to reduce their assessable gross revenues by an allowance for amortization when computing the fees.

Response: The IGRA provided the deduction, not the Commission.

One commenter noted that the 5% amortization limit could be a disadvantage to tribes seeking investors who have to recover their investment in five to seven years.

Response: The 5% amortization limit applies only to the deduction from gross revenues in computing assessable gross revenues, not to operating expenses in computing net revenues.

Commission Budget

One commenter suggested that the Commission should publish its annual fiscal year budget and appropriation.

Response: The Commission's annual budget request, pursuant to the IGRA, is included and published with that of the Department of the Interior in the President's budget. Furthermore, Congressional hearings are held annually on the Commission's budget and appropriation. These hearings are open to the public and the Commission's budget is published by the Committee on Appropriations in its hearing record.

Commission Funding

One commenter suggested that the Commission seek full funding through the Department of the Interior or the Justice Department.

Response: The IGRA provides that the funding for the Commission is to come from annual fee assessments and appropriated funds. The IGRA

authorized funding for the operation of the Commission for only two years.

Penalty Provisions

Commenters have suggested that the regulations provide a schedule of violations and related penalties and that the penalty provisions and the due process standards and procedures be in place in the regulations before penalties are assessed.

Response: The Commission will not assess penalties until violation and related penalty provisions, and a mechanism for appeals, are in place in the regulations.

"Major Rule"

Three commenters questioned the Commission's determination under E.O. 12291 about the effect or significance of this rule.

Response: The Commission has reviewed its rule against the criteria of E.O. 12291:

—An annual effect on the economy of $100 million or more; or,
—A major increase in costs or prices for consumers, individual industries, Federal, State, or local governments, or geographic regions; or,
—Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the U.S. based enterprises to compete with foreign based enterprises in domestic or export markets.

The Commission affirms its determination that this rule is not a "major rule" as contemplated by that order.

Technical Assistance

One commenter suggested that the Commission make available to tribes who need it, technical/accounting assistance in computing revenues and fees. Another suggested that the Commission provide training on the application of the proposed rule.

Response: The Commission has provided the name, address, telephone number and fax number of an individual who will be available to answer, or get answers to, questions about the regulations and to help with the application of these regulations to individual situations. The Commission will assess the need for training and make a determination at a later date.

Class II v. *Class III Games*

One commenter noted that the proposed regulations fail to provide guidance on the distinction between class II and class III games.

Response: Such guidance is beyond the scope of this rule but will be included in a rule to be proposed shortly. In the meantime, to the extent there is uncertainty whether a particular game is class II or class III gaming, tribes must rely on the IGRA, court decisions, and the advice of legal counsel.

Piecemeal Regulation

A number of commenters felt that the Commission should issue the regulations in their entirety, not piecemeal.

Response: The promulgation of all regulations in a single package would take so long and be such a sizable undertaking that necessary guidance would be unduly delayed.

Sequence of Issuance

Many commenters questioned the sequence in which the regulations are being issued. For example, they questioned putting the fee regulations in place before the tribes can obtain a certificate of self-regulation and qualify for reduced fee rates.

Response: The Commission considers many factors in determining which regulations it will work on and issue next. It is especially sensitive that certain rules must be in place before certain other actions can be taken. In the case of the fee rules, IGRA virtually dictates the timing. The IGRA authorized funding for the operation of the Commission for only two years. Subsequent funding must come from fees first and appropriations second, and appropriations only to the extent that the Commission collects fees during the preceding year.

Commenters have suggested that the Commission place the self-regulation certification rules at the top of the list of regulations for publication.

Response: The IGRA provides that a tribe which operates a class II gaming operation and has complied with the various provisions of the IGRA may apply for a certificate of self-regulation. Some of those provisions require regulations, and the Commission must propose and finalize such regulations before the Commission can address the self-regulation rules.

One commenter suggested that the Commission issue temporary certificates of self-regulation or give credits for excess fees paid when certificates of self-regulation are eventually issued.

Response: The IGRA provides reduced fees for tribes that are self-regulating. Until certificates are issued, tribes are not exempt from any requirements and therefore reduced fees are not appropriate.

Head Tax as Alternative

One tribe and numerous individuals commented that the regulations are too complicated and a simple per head tax would be more equitable and fair.

Response: The Commission will try to make the regulations as simple and understandable as possible and provide as much assistance as it can to help tribes and their gaming operations comply with the regulations. The Commission notes that the IGRA does not contemplate or authorize such a tax.

Regulatory Procedures

Executive Order No. 12291 and the Regulatory Flexibility Act

The Commission has determined this document is not a major rule under E.O. 12291 and certifies this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The rule will not have any significant effects on the economy or result in major increases in costs or prices for consumers, individual industries, Federal, State or local governments, agencies, or geographical regions. The rule will not have significant adverse affects on competition, employment, investment, productivity, innovation, or the export/import market.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, the Commission tentatively determined when it published the proposed rule that it will not have a significant impact on small business entities. Because the Commission was new and may have lacked certain information, the Commission invited interested persons to submit written comments regarding the impact of the proposed rule. The comments received were general, did not mention the invitation extended, and did not provide financial information to show that the document would have a significant economic effect on a substantial number of small entities. The Commission notes that it has estimated the economic effect on all class II gaming operations to be less than $2,000,000—$1,500,000 in fees and less than $500,000 in costs of compliance.

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et. seq.* and assigned clearance number 3200–0011.

National Environmental Policy Act

The Commission has determined that this rulemaking does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969.

Dated: August 9, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

List of Subjects in 25 CFR Part 514

Gaming, Indian lands, Reporting and recordkeeping requirements.

National Indian Gaming Commission Regulations

For the reasons set out in the preamble, title 25 of the Code of Federal Regulations is amended as set forth below, adding a new chapter III consisting of parts 500–599.

Chapter III—National Indian Gaming Commission

Parts 500–513 [Reserved]
Part 514—Fees
Parts 515–599 [Reserved]

PART 514—FEES

Sec.
514.1 Annual fees.

Authority: 25 U.S.C. 2706, 2708, 2710, 2717, 2717a.

§ 514.1 Annual fees.

(a) Each class II gaming operation under the jurisdiction of the Commission shall pay to the Commission annual fees as established by the Commission. The Commission, by a vote of not less than two of its members, shall adopt the rates of fees to be paid.

(1) The Commission shall adopt preliminary rates for each calendar year during the first quarter of that year (or as soon thereafter as possible), and, if considered necessary, shall modify those rates during the second and third quarters of the calendar year.

(2) The Commission shall adopt final rates of fees for each calendar year during the fourth quarter of that year.

(3) The Commission shall publish the rates of fees in a notice in the **Federal Register.**

(4) The rates of fees imposed shall be—

(i) No less than 0.5 percent nor more than 2.5 percent of the first $1,500,000 (1st tier), and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000 (2nd tier) of the assessable gross revenues from each class II gaming operation regulated by the Commission.

(5) If a tribe has a certificate of self-regulation, the rate of fees imposed shall be no more than .25 percent of assessable gross revenues from self-regulated class II gaming operations.

(b) For purposes of computing fees, assessable gross revenues for each gaming operation are the annual total amount of money wagered in class II gaming, admission fees (including table or card fees), less any amounts paid out as prizes or paid for prizes awarded, and less an allowance for amortization of capital expenditures for structures.

(1) Unless otherwise provided by the regulations, generally accepted accounting principles shall be used.

(2) The allowance for amortization of capital expenditures for structures shall not exceed 5% of the cost of structures in use throughout the year and 2½% of the cost of structures in use during only a part of the year.

(3) Example:

Gross gaming revenues:		
Money wagered		$1,000,000
Admission fees	5,000	
		1,005,000
Less:		
Prizes paid in cash	$500,000	
Cost of other prizes awarded	10,000	510,000
Gross gaming profit		495,000
Less allowance for amortization of capital expenditures for structures:		
Capital expenditures for structures made in—		
Prior years	750,000	
Current year	50,000	
	800,000	
Maximum allowance:		
$750,000×.05 =	37,500	
50,000×.025 =	1,250	38,750
Assessable gross revenues		$456,250

(4) All revenues from gaming operations determined by the licensing tribe to be class II are to be included.

(c) Each Class II gaming operation regulated by the Commission shall file with the Commission quarterly a statement showing its assessable gross revenues for the previous calendar year.

(1) These quarterly statements shall show the amounts derived from each class II type of game, the amounts deducted for prizes, and the amounts deducted for the amortization of structures;

(2) These quarterly statements shall be filed no later than—March 31, June 30, September 30, and December 31, of each calendar year the Class II gaming operation is subject to the jurisdiction of the Commission, beginning in September 1991. Any changes or adjustments to the previous year's assessable gross revenue amounts from one quarter to the next shall be explained.

(3) The quarterly statements shall identify an individual or individuals to be contacted should the Commission need to communicate further with the gaming operation. The telephone numbers of the individual(s) shall be included.

(4) The quarterly statements shall be transmitted to the Commission to arrive no later than the due date.

(5) Each Class II gaming operation shall determine the amount of fees to be paid and remit them with the statement required in paragraph (c) of this section. The fees payable shall be computed using—

(i) The most recent rates of fees adopted by the Commission pursuant to paragraph (a)(1) or (a)(2) of this section,

(ii) The assessable gross revenues for the previous calendar year as reported pursuant to this paragraph, and

(iii) The amounts paid and credits received during previous quarters.

(6) Each quarterly statement shall include the computation of the fees payable, showing all amounts used in the calculations. The required calculations are as follows:

(i) Multiply the previous calendar year's 1st tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(ii) Multiply the previous calendar year's 2nd tier assessable gross revenues by the rate for those revenues adopted by the Commission.

(iii) Add (total) the results (products) obtained in paragraphs (c)(6) (i) and (ii) of this section.

(iv) Multiply the total obtained in paragraph (c)(6)(iii) of this section by the fraction representing the quarter for which the computation is being made: 1st quarter—¼; 2nd quarter—½ (²⁄₄); 3rd quarter—¾; and 4th quarter—1 (⁴⁄₄). For the purpose of making these computations in 1991 only, the third calendar quarter is the first quarter and the fourth calendar quarter is the second quarter. There will be no third or fourth quarter in 1991.

(v) Subtract the amounts already remitted by the operation for the current year and credits, if any, which are due

for any previous year's overpayment from the amount determined in paragraph (c)(6)(iv) of this section.

(vi) The amount computed in paragraph (c)(6)(v) of this section is the amount to be remitted.

(7) Examples of fee computations follow:

(i) Example 1: Where a filing is made for the first quarter of the calendar year, the previous year's assessable gross revenues are $2,000,000, the fee rates adopted by the Commission are 2% on the first $1,500,000 and 4% on the remainder, and a credit of $2,000 is due from the previous year, the amounts to be used and the computations to be made are as follows:

1st tier revenues—$1,500,000×2%=	$30,000
2nd tier revenues— 500,000×4%=	20,000
Annual fees	50,000
Multiply for fraction of year—¼ or	.25
Fees for first quarter	12,500
Deduct credit due	2,000
Amount to be remitted	$10,500

(ii) Example 2: Where a filing is being made for the third quarter, the previous year's assessable gross revenues are $5,000,000, the fee rates adopted by the Commission are 1% on the first $1,500,000 and 1.5% on the remainder, and $35,000 has already been remitted, the amounts to be used and the computations to be made are as follows:

1st tier revenues—$1,500,000×1%=	$15,000
2nd tier revenues—3,500,000×1.5%=	52,500
Annual fees	67,500
Multiply for fraction of year—¾ or	.75
Fees for first three quarters	50,625
Deduct amounts already remitted	[1] 35,000
Amount to be remitted	$15,625

[1] This amount may be other than $33,750 ($67,500×.50) because the assessable gross revenues may have been adjusted, the fee rate may have changed, a credit for the previous year's overpayment may have been received, or a clerical error may have been discovered.

(iii) Example 3: Where a filing is being made for the *third quarter of 1991,* the previous year's assessable gross revenues are $5,000,000, the fee rates adopted by the Commission are 1% on the first $1,500,000 and 2% on the remainder, and nothing has already been remitted, the amounts to be used and the computations to be made are as follows:

1st tier revenues—$1,500,000 x 1%=	$15,000
2nd tier revenues—3,500,000 x 1%=	35,000
Annual fees	50,000
Multiply for fraction of year—1/4 or	.25
Fees for first quarter	12,500
Deduct amounts already remitted	-0-
Amount to be remitted	$12,500

(8) Quarterly statements, remittances and communications about fees shall be transmitted to the Commission at the following address: Office of Finance, National Indian Gaming Commission, 1850 M Street, NW., suite 250, Washington, DC 20036–5803. Checks should be made payable to the National Indian Gaming Commission (do not remit cash).

(9) The Commission may assess a penalty for failure to file timely a quarterly statement.

(10) Interest shall be assessed at rates established from time to time by the Secretary of the Treasury on amounts remaining unpaid after their due date (31 U.S.C. 3717).

(d) The total amount of all fees imposed during any fiscal year shall not exceed $1,500,000. The Commission shall credit pro-rata any fees collected in excess of this amount against amounts otherwise due at the end of the quarter following the quarter during which the Commission makes such determination.

(1) The Commission will notify each gaming operation as to the amount of overpayment, if any, and therefore the amount of credit to be taken against the next quarterly payment otherwise due.

(2) The notification required in paragraph (d)(1) of this section shall be made in writing addressed to the gaming operation.

(e) Failure to pay fees, any applicable penalties, and interest related thereto may be grounds for:

(1) Closure, or

(2) Disapproving or revoking the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(f) To the extent that revenue derived from fees imposed under the schedule established under this paragraph are not expended or committed at the close of any fiscal year, such funds shall remain available until expended (Pub. L. 101–121; 103 Stat. 718; 25 U.S.C. 2717a) to defray the costs of operations of the Commission.

(g) The information collection requirements contained in paragraph (c) of this section have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 3200–0011. The information is being collected to determine the assessable gross revenues of each gaming operation and the aggregate assessable gross revenues of all gaming operations. The information will be used to set and adjust fee rates and to verify the computations of fees paid by each class II gaming operation. Response is mandatory.

[FR Doc. 91–19374 Filed 8–14–91; 8:45 am]

BILLING CODE 7565-01-M

NATIONAL INDIAN GAMING COMMISSION

Fee Rates

AGENCY: National Indian Gaming Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given, pursuant to 25 CFR 514(a)(3), that the National Indian Gaming Commission has adopted a preliminary annual fee rate of 1% for calendar year 1991. The rate shall apply to all assessable gross revenues (tier 1 and tier 2) from each class II gaming operation regulated by the Commission.

FOR FURTHER INFORMATION CONTACT: Fred W. Stuckwisch, National Indian Gaming Commission, 1850 M Street, NW., suite 250, Washington, DC 20036; telephone 202/632-7003; fax 202/632-7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act established the National Indian Gaming Commission which is charged with, among other things, regulating class II gaming on Indian lands.

The regulations of the Commission (25 CFR part 500) provide for a system of fee assessment and payment that is self-administered by the class II gaming operations. Pursuant thereto, the Commission is required to adopt and communicate assessment rates; the gaming operations are required to apply those rates to their revenues, compute the fees to be paid, and report and remit the fees to the Commission on a quarterly basis.

This rule and this rate are effective beginning with the second half of calendar year 1991. Therefore, all class II gaming operations within the jurisdiction of the Commission are required to begin self-administering the provisions of these regulations and begin reporting and paying any fees that are due to the Commission before the end of the third quarter of 1991 (September 30).

Dated: August 9, 1991.

Anthony J. Hope,

Chairman, National Indian Gaming Commission.

[FR Doc. 91-19375 Filed 8-14-91; 8:45 am]

BILLING CODE 7565-01-M

Thursday
August 15, 1991

Part V

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 31 and 42

Federal Acquisition Regulation; Independent Research and Development and Bid and Proposal Cost; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 31 and 42

[FAR Case 91-37]

Federal Acquisition Regulation; Independent Research and Development and Bid and Proposal Cost

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering changes to the Federal Acquisition Regulation (FAR) to amend the cost principle at 31.205-18, Independent research and development and bid and proposal costs, and Subpart 42.10, Negotiating Advance Agreements for Independent Research and Development/Bid and Proposal Costs.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 15, 1991 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., room 4041, Washington, DC 20405.

Please cite FAR Case 91-37 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4041, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 91-37.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 31.205-18(c)(1) currently requires contractors to negotiate advance agreements when Government reimbursement of their independent research and development and bid and proposal (IR&D/B&P) costs exceeded $5.4 million in the previous fiscal year. If this threshold is met, the required advance agreement may currently be negotiated either at the corporate level or at individual profit centers whose reimbursed IR&D/B&P costs exceeded $675,000 in the previous year. Section 824 of the FY 91 DoD Authorization Act (Pub. L. 101-510) repealed "section 203 of Public Law 91-441 (10 U.S.C. 2358 note)" and amended 10 U.S.C. by adding a new section 2372, "Independent research and development." In part, 10 U.S.C. 2372 raises the IR&D/B&P advance agreement thresholds to $7 million and $700,000, respectively.

The proposed rule would increase the thresholds in 31.205-18(c)(1) (i), (ii), and (v) to the levels prescribed in 10 U.S.C. 2372. In addition, since there is currently no FAR provision to enforce contractor submission of the data needed to perform the proposal evaluations specified in 42.1005, FAR 31.205-18(c)(1)(iv) is expanded to make IR&D/B&P costs unallowable when a contractor fails to provide this technical and financial information. FAR 42.1003(a) is also changed to incorporate the new 10 U.S.C. 2372 citation, and 42.1007(e) is changed to include a specific cross reference to 42.1005(b). Changes to the Defense Federal Acquisition Regulations Supplement to implement other requirements of 10 U.S.C. 2372 are being published separately as a proposed rule.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because most contracts awarded to small businesses are awarded through sealed bidding on a firm fixed price basis. The cost principles apply only where contracts are based on cost or pricing data. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR case 91-37) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 31 and 42

Government procurement; Independent research and development and bid and proposal Cost.

Dated: August 8, 1991.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 31 and 42 be amended as set forth below:

1. The authority citation for 48 CFR parts 31 and 42 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 31—CONTRACT PRINCIPLES AND PROCEDURES

31.205-18 [Amended]

2. Section 31.205-18 is amended by—

a. Removing the amount "$5,400,000" and inserting in its place "$7,000,000" in the following sections:

(i) Paragraph (c)(1)(i), in the first and second sentences.

(ii) Paragraph (c)(v) in the first sentence.

b. Removing from paragraph (c)(1)(i), second sentence, the citation "Section 203 of Pub. L. 91-441" and inserting in its place "10 U.S.C. 2372";

c. Removing in paragraph (c)(1)(ii), first and second sentences, the amounts "$675,000" and inserting in their places "$700,000"; and

d. Adding at the end of paragraph (c)(1)(iv) the words ", or fails to submit required technical and financial information in accordance with agency guidelines (see 42.1006)."

PART 42—CONTRACT ADMINISTRATION

42.1003 [Amended]

3. Section 42.1003 is amended in paragraph (a) by removing the citation "Section 203 of Pub. L. 91-441 as amended by section 208 of Pub. L. 342" and inserting in its place "10 U.S.C. 2372".

42.1007 [Amended]

4. Section 42.1007 is amended in paragraph (e) by revising the reference "42.1005" to read "42.1005(b)".

[FR Doc. 91-19481 Filed 8-14-91; 8:45 am]

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Thursday
August 15, 1991

Part VI

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 32 and 42

Federal Acquisition Regulation; Voluntary Refunds; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 42

[FAR Case 91-39]

Federal Acquisition Regulation; Voluntary Refunds

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council are considering adding a new Subpart 42.9, Voluntary Refunds. This proposed rule, if adopted as a final rule, will establish guidance in the Federal Acquisition Regulation (FAR) on solicitation and acceptance of voluntary refunds from contractors. A voluntary refund is a payment or credit from a contractor to the Government where there is no contractual or legal obligation to make the payment. Voluntary refunds are to be solicited only when retention by a contractor of the amount in question is contrary to good conscience and equity.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before October 15, 1991 to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS) 18th & F Streets NW., room 4041, Washington, DC 20405. Please cite FAR case 91-39 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Mr. Jeremy Olson at (202) 501-3221 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4041, GS Building, Washington, DC 20405, (202) 501-4755. Please cite FAR case 91-39.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed change adds language previously contained in the Defense Federal Acquisitions Regulation regarding administrative guidance on voluntary refunds. A reference to the voluntary refund coverage is added at Subpart 32.6, Contract Debts.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the proposed rule affects only the internal operating procedures of the Government. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite 5 U.S.C. 601, *et seq.* (FAR case 91-39) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose recordkeeping information collection requirements or collection of information from offerors, contractors, or members of the public which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Parts 32 and 42

Government procurement; Voluntary refunds.

Dated: August 8, 1991.

Albert A. Vicchiolla,

Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 32 and 42 be amended as set forth below:

1. The authority citation for 48 CFR parts 32 and 42 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

32.600 [Amended]

2. Section 32.600 is amended by adding the parenthetical "(see Subpart 42.13 for voluntary refunds)" at the end of the paragraph after the word "debts".

PART 42—CONTRACT ADMINISTRATION

3. Part 42, table of contents, is amended by adding Subpart 42.13, consisting of sections 42.1301 through 42.1303, to read as follows:

Subpart 42.13—Voluntary Refunds

Sec.

4. Subpart 42.13, consisting of sections 42.1301 through 42.1303, are added to read as follows:

Subpart 42.13—Voluntary Refunds

42.1301 General.

(a) A voluntary refund is a payment or credit, not required by any contractual or other legal obligation, made to the Government by a contractor or subcontractor either as a payment or as an adjustment under one or more contracts or subcontracts. It may be unsolicited or it may be made in response to a request made by the Government. In most cases voluntary refunds should be requested only after it has been determined that no contractual remedy is readily available to obtain the amount sought from the contractor. Acceptance of a voluntary refund will not prejudice remedies otherwise available to the Government. The voluntary refund should generally be used as a setoff against a future debt owed to the Government by the contractor; *Provided,* the contracting officer determines that the voluntary refund relates directly to that debt, and provided the setoff is not otherwise prohibited by law or regulation.

(b) In deciding whether to solicit a voluntary refund or to accept an unsolicited refund, the contracting officer should ask legal counsel to review the contract or contracts and all data relevant thereto to ensure that there are no readily available contractual remedies and to advise whether the Government's right would be jeopardized or impaired by the contracting officer's proposed action.

42.1302 Solicited refunds.

(a) Voluntary refunds may be requested during or after contract performance. They shall be requested only when it is considered that the Government was overcharged under a contract, or was inadequately compensated for the use of Government-owned property or in the disposition of contractor inventory, and retention by the contractor or subcontractor of the amount in question would be contrary to good conscience and equity.

(b) The decision to solicit a voluntary refund shall be made by the Head of the Contracting Activity or at such other level by departmental procedures.

42.1303 Disposition of voluntary refunds.

(a) If a refund is offered prior to final payment, it is preferable that the contract price be appropriately modified to reflect the refund. In such a case, the amount of the refund shall be credited to the applicable appropriation cited in the contract.

(b) If the refund is made by check, the check should be made payable to the

agency which awarded the contract and sent to the contracting officer. However, if the contract has been assigned to another office for administration, then the check should be sent to the office designated for contract administration. The contracting officer shall forward the check to the office responsible for control of funds. The check shall be accompanied by a letter identifying it as a voluntary refund and listing the contract number(s) involved.

(c) If the refund is other than check or a price reduction, the office responsible for control of the contract funds shall be consulted for proper disposition of the refund.

[FR Doc. 91-19457 Filed 8-14-91; 8:45 am]
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federal register

Thursday
August 15, 1991

Part VII

Department of Health and Human Services

Public Health Service

42 CFR Part 57

Health Professions Student Loan Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 57

RIN 0905-AC78

Health Professions Student Loan Program

AGENCY: Public Health Service, HHS.

ACTION: Final regulation.

SUMMARY: This rule amends existing regulations governing the Health Professions Student Loan (HPSL) program to require schools to: (1) Invest their HPSL funds and return earnings from the investments to the HPSL funds; (2) identify and return to the Department excess cash from the HPSL funds; and (3) determine the collectibility of defaulted loans and, for loans determined to be uncollectible, either obtain approval to write off the loans or reimburse the fund for the amount that remains uncollected on the loans. However, schools are not required to obtain write-off approval or reimburse the fund for loans that became uncollectible prior to August 1, 1985. The Department expects that these revisions will enhance its enforcement capabilities for improving the cash management practices of schools participating in the HPSL program.

EFFECTIVE DATE: This regulation is effective September 16, 1991.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley A. Zimmerman, Chief, Program Accounting and Analysis Branch, Division of Student Assistance, Bureau of Health Professions, Health Resources and Services Administration, room 8-34, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number: 301 443-1700.

SUPPLEMENTARY INFORMATION: On December 18, 1989, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the Federal Register (54 FR 51858), a Notice of Proposed Rulemaking (NPRM) to amend the HPSL regulations to improve the cash management practices of schools participating in the HPSL program. The public comment period on the proposed regulations closed on February 16, 1990. The Department received 66 public comments on this NPRM from 59 school officials, 6 professional associations, and 1 State agency. The comments received on the proposed rule and the Department's responses to the comments are discussed below according to the section numbers and headings of the HPSL regulations affected.

Section 57.205 Health Professions Student Loan Funds

Thirty-two respondents opposed paragraph (a) of this section, which would require that schools must at all times maintain all monies relating to the fund in one or more interest-bearing accounts that are insured by an agency of the Federal Government, or invest in income-producing securities issued or guaranteed by the United States, and assure that all earnings become a part of the fund. This paragraph also stated that an institution must exercise the level of care required of a fiduciary with regard to these deposits and investments.

Most respondents objected to this proposal on the grounds that it would force schools to segregate HPSL funds from their standard investment pool, thereby decreasing earnings and increasing costs. These respondents explained that under the proposal, HPSL funds could not be included in an institution's investment pool since this normally includes investments that are not federally insured. Establishing a separate HPSL account would provide a lower rate of earnings and would require additional administrative costs which could be avoided if the HPSL funds were pooled with other institutional monies for investment purposes. As a result, the proposal as written was deemed to be counterproductive to improving cash management.

Several State schools also indicated that they are required to maintain all funds in a State-designated bank account which is not necessarily federally insured, and that they had no authority under State law to establish a separate account for HPSL funds.

As an alternative to the proposed provision, numerous respondents noted that they are already required to comply with the requirements of Office of Management and Budget (OMB) Circular A-110 regarding Federal cash deposits held by third parties, and suggested that these requirements should be sufficient in assuring proper handling of the HPSL funds. Such an approach would permit schools to integrate their HPSL funds with other school resources, with separate accountability maintained to assure that interest is allocated properly. Others suggested that the language be broadened to include securities issued by agencies of the Federal Government, even if they were not guaranteed by the United States, to allow greater flexibility and higher earnings. One respondent indicated that if an institution was willing to guarantee protection of the fund principal and could demonstrate adequate resources to make such a guarantee, the requirement to use U.S. Government instruments should be waived. This respondent suggested that adequate resources would be demonstrated if the HPSL cash balance was less than 1 percent of the investment pool. Another proposed that the Department require loan funds to be invested in high quality income-producing securities and accounted for separately. It was also stated that the proposed language requiring institutions to exercise the "level of care required of a fiduciary" should be sufficient to take action against a school with poor investment policies, and should eliminate the need to restrict investments to federally-insured accounts. One State school requested that the requirement not be applied to State universities.

In response to these comments, the Department agrees that it would be counterproductive to the improvement of cash management to establish a requirement which prohibits schools from pooling their HPSL funds with other institutional funds for investment purposes, provided that the investment pools are being managed responsibly. The Department also agrees that existing OMB requirements address most of our concerns regarding the investment of Federal funds. Nevertheless, the Department is concerned that the regulations state clearly that the HPSL fund is not to absorb any losses that could occur as a result of using investments that are not federally insured. Accordingly, the Department is amending this provision to state that, in the investment of its HPSL funds, schools must comply with OMB requirements governing the handling of Federal monies. As amended, the provision will further state that the institution is responsible for reimbursing the fund for any losses that may occur due to the use of investments that are not federally insured.

One respondent stated that the regulations should permit a school to claim interest lost, due to a school contributing more than the required one-ninth matching amount, as a deduction against interest income earned by the fund. In response, the Department notes that any overmatch on the part of the school is voluntary. To allow interest income lost by the school as the result of an overmatch to be deducted from interest income would be the equivalent of charging the HPSL fund a fee for "borrowing" school money, and is prohibited by the HPSL statute.

There was also some confusion concerning what was meant by the requirement to deposit and carry HPSL

funds in a "special account." Some respondents understood this to require that HPSL funds be physically segregated from other institutional funds. It is not the Department's intent that schools physically segregate the HPSL fund from other monies, but rather that the school maintain separate accountability for these funds. Accordingly, the Department has amended this language to state that the school must maintain separate accountability for the HPSL fund.

Nine respondents opposed paragraph (a)(2) of this section, which would require that a school must review the balance of the fund on at least a semi-annual basis (quarterly for closing schools), and return the Federal share of any funds determined to be excess to the Federal Government by the due date of the report which identifies the excess monies, with the school's determination subject to the review and approval of the Secretary. The majority of these commenters were concerned that it is difficult to project cash balances, and that a school may show what appears to be excess cash because of extraordinary events. Examples included unexpected windfalls resulting from loan consolidation, the Department's initiative to assure that investment income is properly credited to the HPSL fund, or large amounts of school monies being deposited in the HPSL fund due to write-off disapproval, or significant reductions in school enrollment or class size. In these instances, the schools indicated that it could be difficult to use the funds immediately, and thus they could be deprived of future opportunities to use these funds to aid needy students. It was therefore requested that schools be given discretion in dealing with these situations so that the money does not have to be forfeited, and that the Department recognize and allow for cyclical changes in financial aid needs. It was also suggested that schools be given from 2–5 years to distribute excess cash before being required to return it to the Department.

In response to these comments, the Department notes that the procedures for determining excess cash allow schools to take into account their needs for the next 2 years, and do not require funds to be returned unless they will not be used during this period of time. The Department considers the 2-year period adequate to plan for the use of any unexpected windfalls due to circumstances such as those described above and to accommodate cyclical changes in financial aid needs. The Department further notes that, in unusual cases where the school determines that it will take longer than 2 years to use any excess cash, it may present a letter of explanation to the Department and request permission to retain the funds.

One respondent stated that to avoid a negative cash balance and assure that adequate funds are available when major disbursements occur, the school needs to maintain some cash reserves. The Department agrees that this is reasonable and notes that the procedures for determining excess cash take this into account.

Other commenters indicated that the existing Annual Operating Report (AOR) and Debt Management Report (DMR) are adequate for determining excess cash and providing a mechanism for returning unneeded funds to the Department, and that the audit process allows for adequate verification of the AOR and DMR. Accordingly, they stated that additional regulations were not needed in this area. The Department agrees and clarifies that this regulatory provision is to be implemented through the AOR/DMR reporting process, and will not place any additional reporting burden on the schools.

One commenter was concerned that under this provision the Secretary would have final review and approval of an institution's determination of excess cash, and stated that this should be determined by the school subject to the Department's review. The Department fully intends for the excess cash determination to be made by the school, and expects that the vast majority of schools will act responsibly in complying with this requirement. Nevertheless, because the excess cash determination is based on projections rather than actual figures, it is essential that the Secretary have authority to overrule a school in the event that it uses clearly unreasonable projections with no defensible rationale, or shows a consistent pattern of excess cash that increases and remains unused over a period of several years with no adequate explanation.

One respondent suggested that an appeal process be established for schools that disagree with the Secretary's determination. The Department clarifies that under existing procedures, as explained in the AOR and DMR instructions given to all schools, a school which would like to retain cash determined to be excess may provide a written explanation for retaining the funds. Should the Department determine that the funds must be returned, the noncompliance notice sent to the school provides for departmental review of the decision, upon request by the school, prior to a school's termination from the program.

One respondent suggested that the rules for calculating excess cash should state how to handle institutional advances to the HPSL fund that are made in anticipation of collections, and indicated that the school should not be penalized for providing adequate cash flow from its own resources until collections are received. The Department agrees that temporary institutional advances should be taken into account when determining excess cash, and notes that the current procedures are not intended to penalize a school for a temporary overmatch. To the extent that this creates the appearance of excess cash, the school should provide a written explanation of this to the Department.

One respondent suggested that the Department should assist institutions maintaining excess cash to assure that they are using their funds to the fullest extent possible to help needy students. The Department notes that technical assistance has been provided to schools in the past to help in this area. Further, the Department is willing to help any school which requests this type of assistance, to assure that only funds that the school truly is unable to use are returned to the Department.

One commenter noted that in fiscal years 1989 and 1990, funds returned to the Department as excess cash were not reallocated to schools needing additional funds, and thus the Department's stated concern for maximizing available loan funds was questioned. In response, the Department notes that while the Congress directed in the fiscal year 1990 appropriations bill that these funds be used to reduce the amount of appropriations needed for other programs authorized under Title VII of the Public Health Service Act, excess funds are scheduled for reallocation to eligible schools in fiscal year 1991.

Section 57.210 Repayment and Collection of Health Professions Student Loans

Forty-two respondents opposed paragraph (b)(4) of this section, which would require a school to classify any loan on which payments are 2 or more years past due as uncollectible. The majority of these commenters indicated strong opposition to declaring a loan uncollectible when it is only 2 years past due, noting that this timeframe was neither adequate nor realistic, and was not a clear indicator of a loan's collectibility. These respondents

explained that many loans are collected after they have become more than 2 years past due.

One of the major concerns of respondents was the negative implications of writing off a loan when it is only 2 years past due. They explained that once the loan is written off, the borrower is "off the hook" in terms of his or her repayment obligation, since it is unlikely that institutions would continue to pursue collections. A written off loan is no longer considered an asset by the school and generally appears on the billing system as closed, causing collection activity to cease. This sends the wrong message to the borrower by relieving him or her of the repayment obligation, and thus, in effect, rewarding him or her for continued nonpayment.

In response to the Department's statement that schools are not precluded from continuing to collect on loans that have been written off, respondents explained in great detail the difficulty of attempting to continue collections and handle repayments for loans that had been written off. Once these accounts are written off and removed from active billing, any future activity must be handled manually, including the calculation of interest, sending of bills, aging of accounts, depositing of collected funds, and adjusting of accounting entries to reflect the revised amount of the write off. This dramatically increases the workload on each account, and would create a bookkeeping nightmare should one or more such accounts enter into a partial payment agreement that extended over time. While maintaining an active account manually was deemed to be prohibitively burdensome and not viable, schools that looked at the possibility of creating a new system to handle loans in this category determined that this also would not be cost-effective.

The recurring theme of these commenters was that student loans are unique and in many cases become more rather than less collectible as they become older. This is true because of the likelihood that the earnings of a student loan debtor, if low at the time repayment is scheduled to begin, generally increase as the repayment period progresses. Changes in the economic circumstances of student loan borrowers were cited as a significant factor in converting defaulted loans to repayment. These changes frequently result in a borrower being in a better financial position 3–5 years after graduation, even though repayment is scheduled to begin sooner than that. Respondents explained that for many health professions borrowers, it takes both time and money to start a practice and generate the income needed to repay their debts.

For the above reasons, respondents stated that the effect of the 2-year definition of "uncollectible" would be to discontinue collection on many potentially collectible accounts. The potential loss to the fund was deemed to be greater than any gain that might result from reimbursements made due to a school's failure to exercise due diligence. Rather than improving a school's cash management procedures, this would result in the forfeiting of income to the fund.

Respondents also stated repeatedly that a 24-month limit on their collection activities would adversely affect the entire collection process, allowing inadequate time to complete the normal due diligence procedures, which could take anywhere from 3–5 years depending upon the school. Schools would be forced to alter proven and effective collection procedures because of the length of time they require. For example, under this proposal, it would be impossible to use a second collection agency, which has more than a 30 percent success rate at some schools. Also, the school would lose its ability to exercise alternative collection methods to assure the eventual recovery of funds, such as garnishment, State employment restrictions, State income tax offset, withholding of transcripts, and the ability to effect licensure requests.

Some respondents requested exceptions to the "2-year past due" criteria. For example, they stated that if sporadic or minimal payments were being made on a loan, write off should not be required, even if payments were more than 2 years past due. There was also concern that the requirement failed to allow schools to make exceptions based on individual cases, such as unemployment, economic problems, severe illness, or temporary disability. These respondents noted that only the school can determine what is truly uncollectible, based on its detailed knowledge of the borrower's circumstances and repayment history.

Several respondents opposed applying this requirement to schools with low default rates, stating that a low default rate reflects sound management and should be sufficient for the school to be given discretion in determining a loan's uncollectibility.

Schools also explained that efforts to identify loans more than 2 years past due could be confused by the common practice of accelerating loans at the time of referral to a collection agency. This is because the procedures for aging accounts, which involve dividing the amount past due by the payment amount, could cause an accelerated loan to appear as if it were as much as 10 years past due when it may actually be only 4 months past due.

There was also concern regarding the retroactive liability imposed on schools by this requirement. The prospect of a substantial school liability was viewed as worrisome and in need of further discussion. In response, the Department clarifies that a school liability is imposed only in cases where a school failed to comply with the regulatory due diligence requirements in effect at the time collection activities should have taken place for a particular loan. As a result of the forgiveness provision contained in Public Law 100–607, enacted November 4, 1988, which authorized schools to write off their older uncollectible loans without departmental review, the Department expects that substantial liabilities will not be imposed on schools under the write-off requirement.

Respondents also indicated that since the Department does not pursue the accounts after write off is granted, write off does nothing to further efforts to collect the debt from the borrower and thus is not advantageous; has no precedent in the Department of Education or in any other Federal programs; and is unfair to the borrower, whose credit would be affected with no consideration of his or her intent to repay.

Commenters offered a myriad of suggestions as to how the definition of "uncollectible" should be amended. Many suggested that it be expanded to 3 years. Others said that: (1) There should be a mechanism for requesting an extension to the write-off deadline; (2) schools with low default rates should be allowed to make their own determinations of when a loan is uncollectible; (3) the Department should implement assignment rather than write off; (4) the Department should implement a tiered approach, with progressively more stringent requirements based on escalating default rates; (5) school discretion was essential if the goal is to maximize collections; (6) write off should be optional at 2 years and required at 4 years; (7) the definition should consider willingness to repay; (8) more clear write-off criteria were needed if the 2-year requirement were implemented; (9) loans 2–6 years past due should be in a separate category rather than written off; (10) the Department needed to allow time for enforcing judgments after they

are obtained; (11) write off should not be required until the loan is 5–9 years past due; (12) uncollectibility should be related to completion of the required due diligence steps; (13) the loan should only be uncollectible when the statute of limitations has expired; (14) schools should be allowed to hold loans more than 2 years past due, provided that they review and document the circumstances of the accounts and provide a rationale for retaining them; and (15) the regulations should make clear that schools cannot be found out of compliance for no submitting loans prior to the end of the 2-year period.

In response to the substantive comments and suggestions regarding this proposal, the Department has reconsidered the definition of "uncollectible loan." The Department agrees with respondents that it would be counterproductive to cease collections if there is still a strong likelihood that the borrower will eventually repay. The Department also did not intend to require schools to modify their collection activities in order to comply with this proposal, nor to create the type of administrative burden described by schools as associated with handling these accounts manually after write-off approval is granted.

The Department's concern, in developing the definition of an "uncollectible loan," was to assure that schools do not allow loans to remain on their books indefinitely after all reasonable collection efforts have been exhausted. At the time the proposal was developed, the Department expected that 2 years was a reasonable amount of time in which to complete normal collection activities. After further consideration, the Department agrees with schools that 2 years generally is too short a time to complete due diligence. Further, the Department is compelled by comments indicating that student loan borrowers are unique and that the collectibility of these loans often increases with time. The Department seeks to encourage, rather than discourage, creative collection efforts on the part of schools, such as use of State tax offset, linkage with State licensure, and enforcement of judgments using long-term collection efforts such as placing a lien on property.

Accordingly, the Department has amended this provision to require that the school must conduct an annual review of any loan more than 3 years past due. Where the school determines that the prospects of future collection are promising enough to justify periodic review of the debt, and neither the statute of limitations nor the 10-year repayment period has expired, the school may retain the account for continued collections, provided that it makes an attempt at least semi-annually to collect from the borrower.

The Department chose 3 years past due as the time period after which the annual review must be done, based on the fact that many commenters indicated that due diligence often is completed within a 3-year period. The Department notes that if the school has not completed the due diligence process, this would be sufficient basis for retaining the account. Further, the Department expects that if a borrower were making partial or sporadic payments, this also would be adequate rationale for retaining the account. Other reasons could include the earning potential of the borrower, long term illness or unemployment, a skip whom the school would like to continue attempting to locate on a regular basis, or the availability of collection tools that have not had time to be fully effective (e.g., credit bureau reporting, withholding of transcripts or other school services, State tax offset, a lien on property, etc.). The school would not be required to document the basis for retaining the account; rather, documentation of the semi-annual collection effort would be adequate to indicate that the school had determined that additional collection efforts were warranted.

In complying with the requirement to attempt collections on at least a semi-annual basis, the school is responsible for determining the types of efforts it will make, based on its own experience regarding which procedures are most effective with its borrowers. Examples of efforts that would satisfy this requirement include referring the borrower for State tax offset, reviewing a judgment for enforceability contacting the borrower to remind him or her of the debt, or performing skiptracing if the borrower's location is unknown.

Once the statute of limitations or the 10-year repayment period has expired, whichever is sooner, the school would be required to submit the loan for write-off review or reimburse the fund. The Department notes that the statute of limitations for HPSL loans is determined by State law, and thus this period of time will vary for each school. The Department also realizes that the statute of limitations applies only to the use of judicial remedies, and does not preclude continued collection efforts that might occur without court intervention. Nevertheless, the Department considers it appropriate to require that a school determine a loan uncollectible at the point that the State no longer authorizes the use of judicial remedies. The 10-year repayment period would serve to establish a deadline for determining uncollectibility in any State where the statute of limitations exceeds 10 years or does not apply to these loans.

Two respondents requested that the Department amend this provision to clarify that loans subject to the automatic forgiveness provisions of Pub. L. 100–607 are not subject to paragraph (b)(4)(ii), in addition to (b)(4) (i) and (iii). Rather than amending this paragraph, the Department has responded to these concerns by amending paragraph (b)(4)(ii) to state that the school is not liable for loans subject to the automatic write-off provisions of Pub. L. 100–607.

Thirty-three respondents opposed paragraph (b)(4)(i) of this section, which would require that a school request permission to write off an uncollectible loan within 30 days of the determination that it is uncollectible or reimburse the fund for the full amount of the loan. If write off is disapproved, the school would be required to reimburse the fund for the full amount of principal, interest, and penalty charges that remain uncollected on the loan. Reimbursement would be required by the following June 30 or December 31, except that in no case would the school have less than 30 days following the Secretary's disapproval of the write-off request for reimbursing the fund.

Most respondents stated that 30 days was not sufficient time to submit the loan for write-off review, given the amount of activity involved in preparing the account for submission, including compiling the write-off documentation, preparing a summary of the account's collection history, etc. They noted that a 30-day timeframe would require a monthly review of accounts and would cause a measurable increase in the school's workload which would be especially burdensome during reporting and disbursement periods when workloads are already very heavy. Respondents suggested that a more reasonable timeframe for submission would be 60 days or 90 days. One respondent also requested clarification of when the 30-day period would begin.

In response to these comments, the Department notes that the revised procedures for determining uncollectibility should provide a school with sufficient time to anticipate when a loan will be considered uncollectible and to prepare the case for write-off review within 30 days of that time. The absolute deadline for submission would be 30 days following the expiration of the statute of limitations or the 10-year

repayment period, whichever is sooner. In such cases, the date of the expiration of the statute of limitations or the 10-year repayment period must be documented as part of the student's records. If the school determined that the loan was uncollectible prior to that time, the deadline would be 30 days after the determination of uncollectibility was made, the date of which must be documented as part of the student's collection records. In any case, the debtor's file must indicate that, upon completion of the applicable regulatory due diligence requirements, some type of collection activity occurred at least every 6 months until the determination of uncollectibility was made. For loans for which the required due diligence steps were completed prior to publication of these regulations, the first of the semi-annual collection efforts must occur, or the determination of uncollectibility must be made and the loan submitted for write-off review, no later than 6 months after the effective date of these regulations.

Several respondents were concerned about how the 30-day period for submission would apply to bankruptcies, and suggested that they be given 60 days after receipt of the discharge notice to submit these loans for write-off review. In response, the Department clarifies that if the loan was discharged, the determination of uncollectibility would occur at the point that the school received the discharge notice, and the loan would be required to be submitted for write-off review within 30 days of that date. Since the school would have previously been notified of the bankruptcy proceeding, the school could anticipate the granting of the discharge and begin to prepare the loan for write-off submission before the discharge notice is actually received.

Many commenters stated that it was inappropriate to require that the school pay a borrower's late penalties in cases where a write-off request was disapproved, one objected to schools paying anything other than principal, and others said it was unfair to impose any financial liability on the school. In response, the Department clarifies that the school is not required to absorb any financial liability unless it fails to document compliance with the required due diligence procedures. Where due diligence cannot be documented, the Department considers it appropriate for the school to pay the full outstanding balance of the debt, including penalty charges, since the school's failure to comply with the due diligence requirements is viewed as a factor contributing to the borrower's nonpayment of the debt. Accordingly, no change has been made in this requirement.

One commenter stated that reimbursement by the school would change the 90/10 funding split that is part of the program's terms of agreement, and another questioned whether the school was to reimburse the fund for just the Federal portion or the school contribution as well. The Department clarifies that the school reimburses the full amount of the loan (both Federal and school share) to the loan fund (rather than directly to the Federal Government), and receives the institutional share of these monies at the time of the distribution of assets.

One respondent complained that for closing schools, reimbursing the fund for write-off disapprovals would be a "flow-through" of school funds to the Federal Government, since the school would no longer be making new loans. While this is true, the Department notes that the purpose of the write-off review process is to prevent the Federal Government from absorbing costs associated with losses that occur as a result of the school's failure to follow required due diligence procedures. Thus, it is appropriate for the Federal share of these funds to come back to the Federal Government if the school is in closing status.

Eleven respondents objected to the provision that would require reimbursement within 30 days of the Secretary's determination that it failed to exercise due diligence, indicating that they should be provided with at least 60–90 days to reimburse the fund or to submit documentation that was missing from the initial request. Three requested that the Department institute an appeal process before requiring reimbursement. The Department clarifies that the write-off process currently includes opportunities both to submit additional documentation before a disapproval is finalized and to appeal the decision. These periods could be used by the school to begin the process associated with securing funds for reimbursement in the event that the write off ultimately is denied. The Department also clarifies that reimbursement is only required at the end of each semi-annual reporting period, so that a 30–60 day period for reimbursement would only occur if the disapproval is finalized in May or November.

Several respondents suggested that the Department require a semi-annual review and submission of write-off requests, with the submission to coincide with the semi-annual reports. It was noted that this would allow for routine scheduling of workloads for schools and the Department. As indicated above, the write-off provision as revised requires schools to conduct an annual review of any loan more than 3 years past due to determine its collectibility. While a school may submit its write-off requests at the same time that semi-annual reports are due, the Department is not requiring submission at these times.

Some respondents stated that the Department should require a school to submit loans for write-off review only if the school's default rate is over 5 percent. In response, the Department notes that the responsibility for the write-off review process, which involves a school liability if a loan is disapproved, needs to remain with the Department to assure proper stewardship of Federal funds.

One respondent questioned paragraph (b)(4)(ii) of this section, which would require that if the Secretary determines that the school has exercised due diligence in accordance with the applicable regulatory requirements, the schools will be permitted to reduce its accounts receivable by the full amount of principal, interest, and penalty charges that remain uncollected on the loan. This respondent requested that the Department specify which "applicable regulatory requirements" are implied in the requirement and communicate to schools clear guidance that identifies acceptable forms of due diligence documentation required in the write-off process. In response to this comment, the Department notes that the regulatory requirements in effect at the time that collection efforts should have occurred are the requirements against which collection efforts are evaluated in the write-off review process. Guidance on the write-off process and acceptable documentation has been provided through various policy memoranda, most recently in Policy Memoranda 8 and 10.

Twenty respondents opposed paragraph (b)(4)(iii) of this section, which would require that if a school does not request write-off review within the required time, it must reimburse the fund for the full amount of the loan by the following June 30 or December 31, but no less than 30 days after the determination of uncollectibility. Concerns regarding this provision mirrored those expressed regarding paragraph (b)(4)(i): i.e., that schools should not be required to pay penalty charges on these loans, and that 30 days was too short a time for completing the administrative work associated with reimbursement. Respondents requested

60–90 days to submit the write-off request, and a minimum of 60–90 days to reimburse the fund. In addition, respondents stated that schools should not be repaying the fund if they are in compliance with the due diligence requirements, and that the penalty of full repayment for failing to submit a write off in time was extreme and unnecessary. It was suggested that the Department establish a process for granting extensions where there is a good cause for the delay, and where the school can show that administrative conflicts prevented submitting the loan within the proper timeframe.

In response to these comments, the Department notes that since schools have been given considerably more discretion in determining when a loan becomes uncollectible, the requirements in this paragraph regarding timeframes for write-off submission, penalties for failure to submit, and timeframes for repayment to the fund should not be burdensome. Accordingly, this provision has been retained as proposed.

Other Comments

Several respondents stated that they would need more than 30 days for the initial implementation of the requirement, due to a lag between the date that the regulations are published and received by schools. A few respondents requested that the final regulations not be effective until 6 months after publication to assure adequate time for implementation; or that the regulations be applicable only to loans made on or after the effective date of the regulations because of the difficulty associated with retroactive application. In response, the Department notes that due to the changes associated with the definition of "uncollectible loans," which allow significantly more discretion than the original proposal, it is reasonable for the regulations to be applied to all loans (other than those exempted by Pub. L. 100–607). However, to allow some lead time for implementation, these final regulations are not effective until 30 days after the date of publication. Also, as indicated previously, schools have up to 6 months after the effective date to determine whether any loan more than 3 years past due is uncollectible, and either conduct the first of their semi-annual collection efforts or submit the loan for write-off review.

Regulatory Flexibility Act and Executive Order 12291

The Department expects that the resources required to implement the requirements in these regulations are minimal in comparison to the overall resources of health professions schools. Therefore, in accordance with the requirements of the Regulatory Flexibility Act of 1980, the Secretary certifies that these regulations will not have significant impact on a substantial number of health professions schools.

The Department has also determined that this rule does not meet the criteria for a major rule as defined by section (b) of Executive Order 12291. In addition, costs will not exceed the threshold criteria of $100 million for major rules, therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act of 1980

This final rule contains information collections which have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 and assigned control number 0915–0137. The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Health Professions Student Loan Program: Cash Management.

Description: Schools must report and return excess cash on a semi-annual basis and request permission to write off uncollectible loans or reimburse the loan fund in the full amount of the uncollectible loan.

Description of Respondents: Public or other non-profit institutions.

Estimated Annual Reporting Burden:

Section requirement	Annual No. of respondents	Annual frequency	Average burden per response	Annual burden hours
57.205(a)(2) [1]				
57.210(b)(4)(i)	60	120 requests	30 min	60 hrs.

[1] The burden associated with this regulatory requirement is included in the Annual Operating Report and the Debt Management Report—OMB Clearance Nos. 0915–0044 and 0915–0046.

We received no public comments on the estimated public reporting burden, and it remains the same as in the proposed rule.

List of Subjects in 42 CFR Part 57

Dental health, Education of disadvantaged, Educational facilities, Educational study programs, Emergency medical services, Grant programs—education, Grant programs—health, Health facilities, Health professions, Loan programs—health, Medical and dental schools, Scholarships and fellowships, Student aid.

Dated: April 22, 1991.

James O. Mason,

Assistant Secretary for Health.

Approved: July 5, 1991.

Louis W. Sullivan,

Secretary.

(*Catalog of Federal Domestic Assistance,* No. 13.342, Health Professions Student Loan Program)

Accordingly, subpart C of 42 CFR part 57 is amended as set forth below:

PART 57—GRANTS FOR CONSTRUCTION OF TEACHING FACILITIES, EDUCATIONAL IMPROVEMENT, SCHOLARSHIPS AND STUDENT LOANS

Subpart C—Health Professions Student Loans

1. The authority citation for subpart C is revised to read as follows:

Authority: Sec. 215, Public Health Service Act, 58 Stat. 690, as amended, 63 Stat. 35, (42 U.S.C. 216); secs. 740–747, Public Health Service Act, 77 Stat. 170–173, 90 Stat. 2266–2268, 91 Stat. 390–391, 95 Stat. 920, 99 Stat. 532–536, and as amended by 102 Stat. 3125 (42 U.S.C. 294m–q).

2. Section 57.205 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§ 57.205 Health professions student loan funds.

(a) *Funds established with Federal capital contributions.* Any fund established by a school with Federal capital contributions will be accounted for separately from other funds, providing a clear audit trail for all transactions. At all times the fund must contain monies representing the

institutional capital contribution. The school must at all times maintain all monies relating to the fund in one or more interest-bearing accounts or investment instruments which meet OMB requirements established for Federal monies held by third parties. The school must place all earnings into the fund but may first deduct from total earnings any reasonable and customary charges incurred through the use of an interest-bearing account. An institution shall exercise the level of care required of a fiduciary with regard to these deposits and investments, and shall be responsible for reimbursing the fund for any losses that occur due to the use of investments that are not federally insured.

(1) The Federal capital contribution fund is to be used by the school only for:

(i) Health professions student loans to full-time students;

(ii) Capital distribution as provided in section 743 of the Act or as agreed to by the school and the Secretary; and

(iii) Costs of litigation, costs associated with membership in credit bureaus, and to the extent specifically approved by the Secretary, other collection costs that exceed the usual expenses incurred in the collection of health professions student loans.

(2) A school must review the balance in the fund on at least a semi-annual basis to determine whether the fund balance compared with projected levels of expenditures and collections exceeds its needs. A school in closing status must review the balance in the fund on a quarterly basis. Monies identified as in excess of the school's needs must be reported, and the Federal share returned to the Federal Government, by the due date of the required report which identifies the excess monies. The school's determination is subject to the review and approval of the Secretary.

* * * * *

(c) Failure to comply with the requirements of this section will subject a school to the noncompliance provisions of § 57.218 and the Department's Claims Collections regulations (45 CFR part 30), as appropriate.

3. Section 57.210 is amended by revising paragraph (b)(4) and adding a parenthetical statement at the end of the section text to read as follows:

§ 57.210 Repayment and collection of health professions student loans.

* * * * *

(b) * * *

(4) A school must, on an annual basis, review and assess the collectibility of any loan more than 3 years past due. If the school determines that the prospects of future collection are promising enough to justify periodic review of the debt, and neither the statute of limitations nor the 10-year repayment period has expired, the school may retain the account for continued collections, provided that it makes an attempt at least semi-annually to collect from the borrower. When the due diligence procedures required by paragraph (b)(1) of this section have been exhausted, the school is responsible for determining the collection methods it will use for the semi-annual collection effort required on these loans. If the school determines that the prospects of future collection are not promising, or when the statute of limitations or the 10-year repayment period has expired, the loan must be considered uncollectible. A school may determine a loan to be uncollectible sooner than 3 years past due when it has evidence that the loan cannot be collected, but in no case should a school consider a loan as uncollectible if it has not been in default for a least 120 days. A school is not subject to the requirements in paragraphs (b)(4) (i) and (iii) of this section for loans that became uncollectible, as determined by the school, before August 1, 1985.

(i) A school must request permission to write off an uncollectible loan within 30 days of the determination that it is uncollectible or reimburse the fund in the full amount of the loan, pursuant to § 57.210(b)(4)(iii). The 30-day period for submitting the loan for write-off review begins on the date that the determination of uncollectibility is made, in accordance with paragraph (b)(4) of this section. In any instance where the Secretary determines that a school has failed to exercise due diligence in the collection of a loan, in accordance with the applicable regulatory requirements, the school will be required to place in the fund the full amount of principal, interest, and penalty charges that remains uncollected on the loan. Reimbursement must be made by the following June 30 or December 31, whichever is sooner, except that in no case will a school be required to reimburse the fund in less than 30 days following the Secretary's disapproval of the request for write-off approval.

(ii) If the Secretary determines that a school has exercised due diligence in the collection of a loan, in accordance with the applicable regulatory requirements, or if the school determines that the loan was uncollectible prior to August 1, 1985, the school will be permitted to reduce its accounts receivable for the HPSL fund by the full amount of principal, interest, and penalty charges that remains uncollected on that loan and will not be required to return the Federal share of the loss to the Secretary.

(iii) If a school does not request permission to write off an uncollectible loan within the required timeframe, it must reimburse the fund for the full amount of principal, interest, and penalty charges that remains uncollected on that loan. This reimbursement must be made by the following June 30 or December 31, whichever is sooner, except that in no case will a school be required to reimburse the fund in less than 30 days following its determination that a loan is uncollectible.

(iv) Failure to comply with the requirement of this section will subject a school to the noncompliance provisions of § 57.218 and the Department's Claims Collection regulations (45 CFR part 30), as appropriate.

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(Approved by the Office of Management and Budget under control number 0915–0137)

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Part VIII

Department of Health and Human Services

Public Health Service

42 CFR Part 57

Nursing Student Loan Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 57

RIN 0905-AC76

Nursing Student Loan Program

AGENCY: Public Health Service, HHS.

ACTION: Final regulation.

SUMMARY: This rule amends existing regulations governing the Nursing Student Loan (NSL) program to require schools to: (1) Invest their NSL funds and return earnings from the investments to the NSL funds; (2) identify and return to the Department excess cash from the NSL funds; and (3) determine the collectibility of defaulted loans and, for loans determined to be uncollectible, either obtain approval to write off the loans or reimburse the fund for the amount that remains uncollected on the loans. However, schools are not required to obtain write-off approval or reimburse the fund for loans that became uncollectible prior to January 1, 1983. The Department expects that these revisions will enhance its enforcement capabilities for improving the cash management practices of schools participating in the NSL program.

EFFECTIVE DATE: This regulation is effective September 16, 1991.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley A. Zimmerman, Chief, Program Accounting and Analysis Branch, Division of Student Assistance, Bureau of Health Professions, Health Resources and Services Administration, Room 8–34, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number: 301 443–1700.

SUPPLEMENTARY INFORMATION: On December 18, 1989, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the **Federal Register** (54 FR 51852), a Notice of Proposed Rulemaking (NPRM) to amend the NSL regulations to improve the cash management practices of schools participating in the NSL program. The public comment period on the proposed regulations closed on February 16, 1990. The Department received 58 public comments on this NPRM from 51 school officials, 5 professional associations, and 2 State agencies. The comments received on the proposed rule and the Department's responses to the comments are discussed below according to the section numbers and headings of the NSL regulations affected.

Section 57.305 Nursing Student Loan Funds

Thirty-six respondents opposed paragraph (a) of this section, which would require that schools must at all times maintain all monies relating to the fund in one or more interest-bearing accounts that are insured by an agency of the Federal Government, or invest in income-producing securities issued or guaranteed by the United States, and assure that all earnings become a part of the fund. This paragraph also stated that an institution must exercise the level of care required of a fiduciary with regard to these deposits and investments.

Most respondents objected to this proposal on the grounds that it would force schools to segregate NSL funds from their standard investment pool, thereby decreasing earnings and increasing costs. These respondents explained that under the proposal, NSL funds could not be included in an institution's investment pool since this normally includes investments that are not federally insured. Establishing a separate NSL account would provide a lower rate of earnings and would require additional administrative costs which could be avoided if the NSL funds were pooled with other institutional monies for investment purposes. As a result, the proposal as written was deemed to be counterproductive to improving cash management.

Several State schools also indicated that they are required to maintain all funds in a State-designated bank account which is not necessarily federally insured, and that they had no authority under State law to establish a separate account for NSL funds. Of these, one indicated that the State investment standards would adequately protect the fund.

As an alternative to the proposed provision, numerous respondents noted that they are already required to comply with the requirements of Office of Management and Budget (OMB) Circular A–110 regarding Federal cash deposits held by third parties, and suggested that these requirements should be sufficient in assuring proper handling of the NSL funds. Such an approach would permit schools to integrate their NSL funds with other school resources, with separate accountability maintained to assure that interest is allocated properly. Others suggested that the language be broadened to include securities issued by agencies of the Federal Government, even if they were not guaranteed by the United States, to allow greater flexibility and higher earnings. Still others proposed that the Department require loan funds to be invested in high quality income-producing securities and accounted for separately. It was also stated that the proposed language requiring institutions to exercise the "level of care required of a fiduciary" should be sufficient to take action against a school with poor investment policies, and should eliminate the need to restrict investments to federally-insured accounts. One State school requested that the requirement be amended to allow these funds to be pooled with eligible investments authorized by State statutes.

In response to these comments, the Department agrees that it would be counterproductive to the improvement of cash management to establish a requirement which prohibits schools from pooling their NSL funds with other institutional funds for investment purposes, provided that the investment pools are being managed responsibly. The Department also agrees that existing OMB requirements address most of our concerns regarding the investment of Federal funds. Nevertheless, the Department is concerned that the regulations state clearly that the NSL fund is not to absorb any losses that could occur as a result of using investments that are not federally insured. Accordingly, the Department is amending this provision to state that, in the investment of its NSL funds, schools must comply with OMB requirements governing the handling of Federal monies. As amended, the provision will further state that the institution is responsible for reimbursing the fund for any losses that may occur due to the use of investments that are not federally insured.

Two respondents indicated that if there is only a small amount of money in the loan fund, the cost of keeping the funds in an interest-bearing account may exceed the interest earned. This was expected to be especially true for closing schools, which remit the Federal share of any cash balance in the fund to the Department on a quarterly basis. One suggested that for closing schools, interest-bearing accounts be required only when the balance due to the Federal Government exceeds $5,000 at the end of two quarters in a fiscal year. In response to this concern, the Department has amended the provision to state that, where the school can document that the costs associated with use of an interest-bearing account would exceed expected interest income, the school is not required to use an interest-bearing account. The Department has not adopted the $5,000 cut-off since it is prudent to keep any amount in an

interest-bearing account to the extent that earnings can be realized.

One respondent indicated that this would prohibit keeping a small amount of the fund in a regular checking account to maintain the minimum balance required by the bank. Another stated that a school should be required to move its funds from checking to savings only if it would result in greater earnings. The Department clarifies that a school may comply with this provision by keeping all or part of its funds in an interest-bearing checking account or savings account.

One respondent understood this provision to mean that the school was to draw all Federal capital contributions awarded to it, regardless of need, and carry these monies in a special account. The Department clarifies that the provision does not require schools to draw funds before they are needed, but merely provides guidance regarding proper management of Federal funds once they have been drawn down.

Another respondent understood this provision to mean that the institutional contribution had to remain in the loan fund at all times and could not be used for making loans to students. The Department clarifies that the provision requires that the institutional contribution be accounted for as part of the fund at all times, with the intent that this money, as well as any other money in the fund, be used for making loans to students.

One respondent stated that the regulations should permit a school to claim interest lost, due to a school contributing more than the required one-ninth matching amount, as a deduction against interest income earned by the fund. In response, the Department notes that any overmatch on the part of the school is voluntary. To allow interest income lost by the school as the result of an overmatch to be deducted from interest income would be the equivalent of charging the NSL fund a fee for "borrowing" school money, and is prohibited by the NSL statute.

There was also some confusion concerning what was meant by the requirement to deposit and carry NSL funds in a "special account." Some respondents understood this to require that NSL funds be physically segregated from other institutional funds. It is not the Department's intent that schools physically segregate the NSL fund from other monies, but rather that the school maintain separate accountability for these funds. Accordingly, the Department has amended this language to state that the school must maintain separate accountability for the NSL fund.

Ten respondents opposed paragraph (a)(2) of this section, which would require that a school must review the balance of the fund on at least a semi-annual basis (quarterly for closing schools), and return the Federal share of any funds determined to be excess to the Federal Government by the due date of the report which identifies the excess monies, with the school's determination subject to the review and approval of the Secretary. These commenters were concerned that a school may show what appears to be excess cash because of unexpected windfalls resulting from such things as the Department's initiative to assure that investment income is properly credited to the NSL fund, or large amounts of school monies being deposited into the NSL fund due to write-off disapprovals. In these instances, the schools indicated that it could be difficult to use the funds immediately. Also, temporary conditions might exist whereby the institution would use in the near future funds that appeared to be "excess" under the current procedure. It was therefore requested that schools be given adequate time to distribute excess cash before being required to return it to the Department.

In response to these comments, the Department notes that the procedures for determining excess cash allow schools to take into account their needs for the next 2 years, and do not require funds to be returned unless they will not be used during this period of time. The Department considers the 2-year period adequate to plan for the use of any unexpected windfalls due to circumstances such as those described above. The Department further notes that, in unusual cases where the school determines that it will take longer than 2 years to use excess cash, it may present a letter of explanation to the Department and request permission to retain the funds.

Numerous commenters indicated that the existing Annual Operating Report (AOR) and Debt Management Report (DMR) are adequate for determining excess cash and providing a mechanism for returning unneeded funds to the Department, and that the audit process allows for adequate verification of the AOR and DMR. Accordingly, they stated that additional regulations were not needed in this area. The Department agrees and clarifies that this regulatory provision is to be implemented through the AOR/DMR reporting process, and will not place any additional reporting burden on the schools.

A few commenters were concerned that under this provision the Secretary would have final review and approval of an institution's determination of excess cash, and stated that this should be determined by the school subject to the Department's review. There was also concern that the Secretary should not overrule reasonable estimates made by a school. The Department fully intends for the excess cash determination to be made by the school, and expects that the vast majority of schools will act responsibly in developing reasonable estimates to comply with this requirement. Nevertheless, because the excess cash determination is based on projections rather than actual figures, it is essential that the Secretary have authority to overrule a school in the event that it uses clearly unreasonable projections with no defensible rationale, or shows a consistent pattern of excess cash that increases and remains unused over a period of several years with no adequate explanation.

One respondent suggested that the Secretary's review should be completed promptly, with a school given time to respond in cases where the Secretary disagrees with its determination. The Department notes that the process for reviewing excess cash balances includes an opportunity for a school to respond and justify its calculations in the event that the Secretary disagrees with its projections.

Two respondents suggested that the excess cash calculation should recognize institutional advances to the NSL fund that are made in anticipation of collections, and that a school should not be penalized for providing adequate cash flow from its own resources until collections are received. The Department notes that the current procedures are not intended to penalize a school for a temporary overmatch, and expects that in most situations this would not artificially create an excess cash balance. However, in the event that this creates the appearance of excess cash, the school should provide a written explanation to the Department.

One respondent stated that for closing schools, the requirement to return funds quarterly should provide for a minimum amount, below which the remittance would only be required semi-annually or annually. It was suggested that this level be set at $200–$500, since the paperwork associated with the remittance was not justified for a smaller amount. In response, the Department notes that the NSL statute requires that closing schools remit funds to the Department on a quarterly basis. Accordingly, no change has been made in this regard.

One respondent suggested that "excess cash" be defined in the regulations so that schools would

clearly understand how to determine the amount of funds due to the Federal Government. In response, the Department notes that the procedures for determining excess cash are clearly set forth for schools in the semi-annual reports, and involve a level of detail that is inappropriate for these regulations.

One respondent stated that schools should be given at least 90 days to return these funds. The Department notes that the requirement to submit the funds with the semi-annual report provides them with 45 days from the end of the reporting period. Since excess cash represents funds on hand that the school is unable to use, the Department considers a 45-day period more than adequate for returning these funds to the Federal Government.

Section 57.310 Repayment and Collection of Nursing Student Loans

Thirty-four respondents opposed paragraph (b)(4) of this section, which would require a school to classify any loan on which payments are 2 or more years past due as uncollectible. The majority of these commenters indicated strong opposition to declaring a loan uncollectible when it is only 2 years past due, noting that this timeframe was neither adequate nor realistic, and was not a clear indicator of a loan's collectibility. These respondents explained that many loans are collected after they have become more than 2 years past due.

One of the major concerns of respondents was the negative implications of writing off a loan when it is only 2 years past due. They explained that once the loan is written off, the borrower is "off the hook" in terms of his or her repayment obligation, since it is unlikely that institutions would continue to pursue collections. A written off loan is no longer considered an asset by the school and generally appears on the billing system as closed, causing collection activity to cease. This sends the wrong message to the borrower by relieving him or her of the repayment obligation, and thus, in effect, rewarding him or her for continued nonpayment.

In response to the Department's statement that schools are not precluded from continuing to collect on loans that have been written off, respondents explained in great detail the difficulty of attempting to continue collections and handle repayments for loans that had been written off. Once these accounts are written off and removed from active billing, any future activity must be handled manually, including the calculation of interest, sending of bills, aging of accounts, depositing of collected funds, and adjusting of accounting entries to reflect the revised amount of the write off. This dramatically increases the workload on each account, and would create a bookkeeping nightmare should one or more such accounts enter into a partial payment agreement that extended over time. While maintaining an active account manually was deemed to be prohibitively burdensome and not viable, schools that looked at the possibility of creating a new system to handle loans in this category determined that this also would not be cost-effective.

The recurring theme of these commenters was that student loans are unique and in many cases become more rather than less collectible as they become older. This is true because of the likelihood that the earnings of a student loan debtor, if low at the time repayment is scheduled to begin, generally increase as the repayment period progresses. Respondents explained that this is especially true for nurses, since entry-level nursing positions generally are not high-paying. Changes in the economic circumstances of student loan borrowers were cited as a significant factor in converting defaulted loans to repayment. These changes frequently result in a borrower being in a better financial position 3–5 years after graduation, even though repayment is scheduled to begin sooner.

For the above reasons, respondents stated that the effect of the 2-year definition of "uncollectible" would be to discontinue collection on many potentially collectible accounts. The potential loss to the fund was deemed to be greater than any gain that might result from reimbursements made due to a school's failure to exercise due diligence. Rather than improving a school's cash management procedures, this would result in the forfeiting of income to the fund.

Respondents also stated repeatedly that a 24-month limit on their collection activities would adversely affect the entire collection process, allowing inadequate time to complete the normal due diligence procedures, which could take anywhere from 3–5 years depending upon the school. Schools would be forced to alter proven and effective collection procedures because of the length of time they require. For example, under this proposal, it would be impossible to use a second collection agency, which has more than a 30 percent success rate at some schools. Also, the school would lose its ability to exercise alternative collection methods to assure the eventual recovery of funds, such as garnishment, State employment restrictions, State income tax offset, withholding of transcripts, and the ability to effect licensure requests.

Some respondents requested exceptions to the "2-year past due" criteria. For example, they stated that if sporadic or minimal payments were being made on a loan, write off should not be required, even if payments were more than 2 years past due. There was also concern that the requirement failed to allow schools to make exceptions based on individual cases, such as unemployment, economic problems, severe illness, or temporary disability. These respondents noted that only the school can determine what is truly uncollectible, based on its detailed knowledge of the borrower's circumstances and repayment history.

Several respondents opposed applying this requirement to schools with low default rates, stating that a low default rate reflects sound management and should be sufficient for the school to be given discretion in determining a loan's uncollectibility.

Schools also explained that efforts to identify loans more than 2 years past due could be confused by the common practice of accelerating loans at the time of referral to a collection agency. This is because the procedures for aging accounts, which involve dividing the amount past due by the payment amount, could cause an accelerated loan to appear as if it were as much as 10 years past due when it may actually be only 4 months past due.

Respondents also indicated that write off has no precedent in the Department of Education (ED) or in any other Federal programs, and is unfair to the borrower, whose credit would be affected with no consideration of his or her intent to repay.

Commenters offered a myriad of suggestions as to how the definition of "uncollectible" should be amended. Many suggested that it be expanded to 3 years. Others said that: (1) There should be a mechanism for requesting an extension or allowing exceptions to the write-off deadline; (2) schools with low default rates should be allowed to make their own determinations of when a loan is uncollectible; (3) the Department should implement assignment rather than write off; (4) school discretion was essential if the goal is to maximize collections; (5) write off should be optional at 2 years and required at 4 years; (6) more clear write-off criteria are needed, following the example of the Department of Education (ED), if the 2-year requirement is implemented; (7) loans 2–6 years past due should be in a separate category rather than requiring them to be written off; (8) write off

should not be required until the loan is 4–9 years past due; (9) uncollectibility should be related to completion of the required due diligence steps; (10) the loan should only be uncollectible when the statute of limitations has expired; (11) schools should be allowed to hold loans more than 2 years past due, provided that they review and document the circumstances of the accounts and provide a rationale for retaining them; (12) the regulations should make clear that schools cannot be found out of compliance for no submitting loans prior to the end of the 2-year period; (13) timeframes, procedures, and language similar to those used by ED for Perkins loans should be adopted; (14) the exception for loans that are part of an open court case should be clarified; and (15) "uncollectible loans" should exclude loans where the borrower has demonstrated a willingness to repay.

In response to the substantive comments and suggestions regarding this proposal, the Department has reconsidered the definition of "uncollectible loan." The Department agrees with respondents that it would be counterproductive to cease collections if there is still a strong likelihood that the borrower will eventually repay. The Department also did not intend to require schools to modify their collection activities in order to comply with this proposal, nor to create the type of administrative burden described by schools as associated with handling these accounts manually after write-off approval is granted.

The Department's concern, in developing the definition of an "uncollectible loan," was to assure that schools do not allow loans to remain on their books indefinitely after all reasonable collection efforts have been exhausted. At the time the proposal was developed, the Department expected that 2 years was a reasonable amount of time in which to complete normal collection activities. After further consideration, the Department agrees with schools that 2 years generally is too short a time to complete due diligence. Further, the Department is compelled by comments indicating that student loan borrowers are unique and that the collectibility of these loans often increases with time. The Department seeks to encourage, rather than discourage, creative collection efforts on the part of schools, such as use of State tax offset, linkage with State licensure, and enforcement of judgments using long-term collection efforts such as placing a lien on property.

Accordingly, the Department has amended this provision to require that the school must conduct an annual review of any loan more than 3 years past due. Where the school determines that the prospects of future collection are promising enough to justify periodic review of the debt, and neither the statute of limitations nor the 10-year repayment period has expired, the school may retain the account for continued collections, provided that it makes an attempt at least semi-annually to collect from the borrower.

The Department chose 3 years past due as the time period after which the annual review must be done, based on the fact that many commenters indicated that due diligence often is completed within a 3-year period. The Department notes that if the school has not completed the due diligence process, this would be sufficient basis for retaining the account. Further, the Department expects that if a borrower were making partial or sporadic payments, this also would be adequate rationale for retaining the account. Other reasons could include the earning potential of the borrower, long term illness or unemployment, a skip whom the school would like to continue attempting to locate on a regular basis, or the availability of collection tools that have not had time to be fully effective (e.g., credit bureau reporting, withholding of transcripts or other school services, State tax offset, a lien on property, etc.). The school would not be required to document the basis for retaining the account; rather, documentation of the semi-annual collection effort would be adequate to indicate that the school had determined that additional collection efforts were warranted.

In complying with the requirement to attempt collections on at least a semi-annual basis, the school is responsible for determining the types of efforts it will make, based on its own experience regarding which procedures are most effective with its borrowers. Examples of efforts that would satisfy this requirement including referring the borrower for State tax offset, reviewing a judgment for enforceability, contacting the borrower to remind him or her of the debt, or performing skiptracing if the borrower's location is unknown.

Once the statute of limitations or the 10-year repayment period has expired, whichever is sooner, the school would be required to submit the loan for write-off review or reimburse the fund. The Department notes that the statute of limitations for NSL loans is determined by State law, and thus this period of time will vary for each school. The Department also realizes that the statute of limitations applies only to the use of judicial remedies, and does not preclude continued collection efforts that might occur without court intervention. Nevertheless, the Department considers it appropriate to require that a school determine a loan uncollectible at the point that the State no longer authorizes the use of judicial remedies. The 10-year repayment period would serve to establish a deadline for determining uncollectibility in any State where the statute of limitations exceeds 10 years or does not apply to these loans.

One respondent suggested that the provision state that the school has the right to collect write-off approvals for its own account and not for the NSL fund. The Department clarifies that any collections made on write-off approvals must be returned to the NSL fund in accordance with the NSL statute.

One respondent suggested that closing schools be allowed to turn over all outstanding loans to the Department for collection. In response, the Department notes that the NSL statute does not authorize assignment of these loans to the Federal Government.

One respondent suggested that the last sentence of paragraph (b)(4) should state that pre-1983 loans will be treated as loans written off following due diligence in accordance with paragraph (b)(4)(ii) and will reduce the school's accounts receivable by the amount forgiven. Rather than amending this paragraph, the Department has responded to this concern by amending paragraph (b)(4)(ii) to state that the school is not liable for loans subject to the automatic forgiveness provisions of Pub. L. 100–607.

Thirty-four respondents opposed paragraph (b)(4)(i) of this section, which would require that a school request permission to write off an uncollectible loan within 30 days of the determination that it is uncollectible or reimburse the fund for the full amount of the loan. If write off were disapproved, the school would be required to reimburse the fund for the full amount of principal, interest, and penalty charges that remain uncollected on the loan. Reimbursement would be required by the following June 30 or December 31, except that in no case would the school have less than 30 days following the Secretary's disapproval of the write-off request for reimbursing the fund.

Most respondents stated that 30 days was not sufficient time to submit the loan for write-off review, given the amount of activity involved in preparing the account for submission, including compiling the write-off documentation, preparing a summary of the account's

collection history, etc. They noted that a 30-day timeframe would require a monthly review of accounts and would cause a measurable increase in the school's workload which would be especially burdensome during reporting and disbursement periods when workloads are already very heavy. It would create difficulties both for schools with large loan volumes, and for small offices which could get caught in violation of the 30-day limit due to travel, illness, registration, exit interviews, or other periods of very heavy workloads. Respondents suggested that a more reasonable timeframe for submission would be 60 days or 90 days; or that more flexibility was needed if a 30-day submission requirement were to be implemented, such as an extension where the school demonstrates that an administrative conflict or burden prevented submission within the required period. One respondent also requested clarification of when the 30-day period would begin, and one requested a 6-month implementation period after the effective date of the regulation.

In response to these comments, the Department notes that the revised procedures for determining uncollectibility should provide a school with sufficient time to anticipate when a loan will be considered uncollectible and to prepare the case for write-off review within 30 days of that time. The absolute deadline for submission would be 30 days following the expiration of the statute of limitations or the 10-year repayment period, whichever is sooner. In such cases, the date of the expiration of the statute of limitations or the 10-year repayment period must be documented as part of the student's records. If the school determined that the loan was uncollectible prior to that time, the deadline would be 30 days after the determination of uncollectibility was made, the date of which must be documented as part of the student's collection records. In any case, the debtor's file must indicate that, upon completion of the applicable regulatory due diligence requirements, some type of collection activity occurred at least every 6 months until the determination of uncollectibility was made. For loans for which the required due diligence steps were completed prior to publication of these regulations, the first of the semi-annual collection efforts must occur, or the determination of uncollectibility must be made and the loan submitted for write-off review, no later than 6 months after the effective date of these regulations.

One respondent was concerned about how the 30-day period for submission would apply to bankruptcies, and suggested that they be given 60 days after receipt of the discharge notice to submit these loans for write-off review. In response, the Department clarifies that if the loan was discharged, the determination of uncollectibility would occur at the point that the school received the discharge notice, and the loan would be required to be submitted for write-off review within 30 days of that date. Since the school would have previously been notified of the bankruptcy proceeding, the school could anticipate the granting of the discharge and begin to prepare the loan for write-off submission before the discharge notice is actually received.

Many commenters stated that it was inappropriate to require that the school pay a borrower's late penalties in cases where a write-off request was disapproved; one objected to schools paying anything other than principal; still others said it was burdensome to impose any retroactive financial liability on the school, and that this was an excessive penalty which could jeopardize a school's continued participation in the program. One respondent stated that imposing a school liability was unfair, since borrowers who drop out are generally the collection problems, and their loans would be uncollectible regardless of whether the school exercised due diligence. Also, since schools have little say in the eligibility criteria, this respondent concluded that they should not be responsible for loans that are not repaid. Another respondent noted that proof of due diligence cannot always be substantiated since a paper trail was not always maintained in a manner acceptable to the Department.

In response to these comments, the Department clarifies that a school is not required to absorb any financial liability unless it fails to document compliance with the regulatory due diligence requirements in effect at the time collection activities should have taken place for a particular loan. Further, Public Law 100–607, enacted November 4, 1988, contained a "forgiveness provision" which authorized schools to write off their older uncollectible loans without departmental review. Since documentation of older loans is no longer an issue, it is not expected that substantial liabilities will be imposed on schools under this requirement. Nevertheless, where due diligence on more recent loans cannot be documented, the Department considers it appropriate for the school to pay the full outstanding balance of the debt, including penalty charges, since the school's failure to carry out its collection responsibilities is viewed as a factor contributing to the borrower's nonpayment of the debt. Accordingly, no change has been made in this requirement.

One commenter stated that reimbursement by the school would change the 90/10 funding split that is part of the program's terms of agreement. The Department clarifies that the school reimburses the full amount of the loan (both Federal and school share) to the loan fund (rather than directly to the Federal Government), and receives the institutional share of these monies at the time of the distribution of assets; thus, the 90/10 funding split is not changed.

Numerous respondents objected to the provision that would require reimbursement within 30 days of the Secretary's determination that it failed to exercise due diligence, indicating that they should be provided with at least 60–90 days to reimburse the fund or to submit documentation that was missing from the initial request. Three requested that the Department institute an appeal process before requiring reimbursement. The Department clarifies that the write-off process currently includes opportunities both to submit additional documentation before a disapproval is finalized and to appeal the decision. These periods could be used by the school to begin the process associated with securing funds for reimbursement in the event that the write off ultimately is denied. The Department also clarifies that reimbursement is only required at the end of each semi-annual reporting period, so that a period of less than 60 days for reimbursement would only occur if the disapproval is finalized in May or November.

Several respondents suggested that the Department require a semi-annual review and submission of write-off requests, with the submission to coincide with the semi-annual reports. It was noted that this would allow for routine scheduling of workloads for schools and the Department. As indicated above, the write-off provision as revised requires schools to conduct an annual review of any loan more than 3 years past due to determine its collectibility. While a school may submit its write-off requests at the same time that semi-annual reports are due, the Department is not requiring submission at these times.

Some respondents stated that the Department should require a school to submit loans for write-off review only if

the school's default rate is over 5 percent. In response, the Department notes that the responsibility for the write-off review process, which involves a school liability if a loan is disapproved, needs to remain with the Department to assure proper stewardship of Federal funds.

One respondent opposed paragraph (b)(4)(ii) of this section, which would require that if the Secretary determines that the school has exercised due diligence in accordance with the applicable regulatory requirements, the schools will be permitted to reduce its accounts receivable by the full amount of principal, interest, and penalty charges that remain uncollected on the loan. This respondent requested that the Department add to this provision a reference to the older uncollectible loans excluded from write-off review as a result of Pub. L. 100–607. The Department has amended this paragraph accordingly.

Nine respondents opposed paragraph (b)(4)(iii) of this section, which would require that if a school does not request write-off review within the required time, it must reimburse the fund for the full amount of the loan by the following June 30 or December 31, but not less than 30 days after the determination of collectibility. Concerns regarding this provision mirrored those expressed regarding paragraph (b)(4)(i): i.e., that schools should not be required to pay penalty charges on these loans; that 30 days was too short a time for completing the administrative work associated with reimbursement; and that schools should not be required to reimburse the fund for any of these loans. Respondents requested at least 60 days to submit the write-off request, and a minimum of 60 days to reimburse the fund.

In response to these comments, the Department notes that since schools have been given considerably more discretion in determining when a loan becomes uncollectible, the requirements in this paragraph regarding timeframes for write-off submission, penalties for failure to submit, and timeframes for repayment to the fund should not be burdensome. Accordingly, this provision has been retained as proposed.

One respondent questioned what effect the noncompliance provision in paragraph (b)(4)(iv) would have on closing schools. The Department clarifies that while closing schools could not be terminated, the Department would follow the Claims Collections regulations in enforcing compliance with these requirements.

Other Comments

Several respondents stated that they would need more than 30 days for the initial implementation of the requirement, due to a lag between the date that the regulations are published and received by schools. A few respondents requested that the final regulations not be effective until 6 months after publication to assure adequate time for implementation; or that the regulations be applicable only to loans made on or after the effective date of the regulations because of the difficulty associated with retroactive application. In response, the Department notes that due to the changes associated with the definition of "uncollectible loans," which allow significantly more discretion than the original proposal, it is reasonable for the regulations to be applied to all loans (other than those exempted by Pub. L. 100–607). However, to allow some lead time for implementation, these final regulations are not effective until 30 days after the date of publication. Also, as indicated previously, schools have up to 6 months after the effective date to determine whether any loan more than 3 years past due is uncollectible, and either conduct the first of their semi-annual collection efforts or submit the loan for write-off review.

Regulatory Flexibility Act and Executive Order 12291

The Department expects that the resources required to implement the requirements in these regulations are minimal in comparison to the overall resources of nursing schools. Therefore, in accordance with the requirements of the Regulatory Flexibility Act of 1980, the Secretary certifies that these regulations will not have significant impact on a substantial number of nursing schools.

The Department has also determined that this rule does not meet the criteria for a major rule as defined by section (b) of Executive Order 12291. In addition, costs will not exceed the threshold criteria of $100 million for major rules, therefore, a regulatory impact analysis is not required.

Paperwork Reduction Act of 1980

This final rule contains information collections which have been approved by the Office of Management and Budget under the Paperwork Reduction Act of 1980 and assigned control number 0915–0138. The title, description, and respondent description of the information collections are shown below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Title: Nursing Student Loan Program: Cash Management.

Description: Schools must report and return excess cash on a semi-annual basis (quarterly for closing schools) and request permission to write off uncollectible loans or reimburse the loan fund in the full amount of the uncollectible loan.

Description of Respondents: Public or other non-profit institutions.

Estimated Annual Reporting Burden:

Section requirement	Annual No. of respondents	Annual frequency	Average burden per response	Annual burden hrs.
57.305(a)(2)	(The burden associated with this regulatory requirement is included in the Annual Operating report and the Debt Management Report—OMB Clearance Nos. 0915–0044 and 0915–0046)			
57.310(b)(4)(i)	200	800 requests	30 min.	400 hrs.

We received no public comments on the estimated public reporting burden, and it remains the same as in the proposed rule.

List of Subjects in 42 CFR Part 57

Dental health, Education of disadvantaged, Educational facilities, Educational study programs, Emergency medical services, Grant program—education, Grant programs—health, Health facilities, Health professions, Loan programs—health, Medical and dental schools, Scholarships and fellowships, Student aid.

Dated: April 22, 1991.

James O. Mason,

Assistant Secretary for Health.

Approved; July 5, 1991.

Louis W. Sullivan,

Secretary

(Catalog of Federal Domestic Assistance, No. 13.364, Nursing Student Loan Program)

Accordingly, subpart D of 42 CFR part 57 is amended as set forth below:

PART 57—GRANTS FOR CONSTRUCTION OF TEACHING FACILITIES, EDUCATIONAL IMPROVEMENT, SCHOLARSHIPS AND STUDENT LOANS

Subpart D—Nursing Student Loans

1. The authority citation for subpart D is revised to read as follows:

Authority: Sec. 215, Public Health Service Act, 58 Stat. 690, 67 Stat. 631 (42 U.S.C. 216); secs. 835–482, Public Health Service Act, 77 Stat. 913–916, as amended, 99 Stat. 397–400, 536–537, and as amended by 102 Stat. 3160–3161 (42 U.S.C. 297 a–i).

2. Section 57.305 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§ 57.205 Nursing student loan funds.

(a) *Funds established with Federal capital contributions.* Any fund established by a school with Federal capital contributions will be accounted for separately from other funds, providing a clear audit trail for all transactions. At all times the fund must contain monies representing the institutional capital contribution. The school must at all times maintain all monies relating to the fund in one or more interest-bearing accounts or investment instruments which meet OMB requirements established for Federal monies held by third parties, except that if the school documents that the costs associated with the use of an interest-bearing account would exceed expected earnings, the school is not required to maintain these monies in an interest-bearing account. The school must place all earnings into the fund but may first deduct from total earnings any reasonable and customary charges incurred through the use of an interest-bearing account. An institution shall exercise the level of care required of a fiduciary with regard to these deposits and investments, and shall be responsible for reimbursing the fund for any losses that occur due to the use of investments that are not federally insured.

(1) The Federal capital contribution fund is to be used by the school only for:

(i) Nursing student loans to full-time or half-time students;

(ii) Capital distribution as provided in section 839 of the Act or as agreed to by the school and the Secretary; and

(iii) Costs of litigation, costs associated with membership in credit bureaus, and to the extent specifically approved by the Secretary, other collection costs that exceed the usual expenses incurred in the collection of nursing student loans.

(2) A school must review the balance in the fund on at least a semi-annual basis to determine whether the fund balance compared with projected levels of expenditures and collections exceeds its needs. A school in closing status must review the balance in the fund on a quarterly basis. Monies identified as in excess of the school's needs must be reported, and the Federal share returned to the Federal Government, by the due date of the required report which identifies the excess monies. The school's determination is subject to the review and approval of the Secretary.

* * * * *

(c) Failure to comply with the requirements of this section will subject a school to the noncompliance provisions of § 57.318 and the Department's Claims Collections regulations (45 CFR part 30), as appropriate.

3. Section 57.310 is amended by revising paragraph (b)(4) and adding a parenthetical statement at the end of the section text to read as follows:

§ 57.310 Repayment and collection of nursing student loans.

* * * * *

(b) * * *

(4) A school must, on an annual basis, review and assess the collectibility of any loan more than 3 years past due. If the school determines that the prospects of future collection are promising enough to justify periodic review of the debt, and neither the statute of limitations nor the 10-year repayment period has expired, the school may retain the account for continued collections, provided that it makes an attempt at least semi-annually to collect from the borrower. When the due diligence procedures required by paragraph (b)(1) of this section have been exhausted, the school is responsible for determining the collection methods it will use for the semi-annual collection effort required on these loans. If the school determines that the prospects of future collection are not promising, or when the statute of limitations or the 10-year repayment period has expired, the loan must be considered uncollectible. A school may determine a loan to be uncollectible sooner than 3 years past due when it has evidence that the loan cannot be collected, but in no case should a school consider a loan as uncollectible if it has not been in default for at least 120 days. A school is not subject to the requirements in paragraphs (b)(4) (i) and (iii) of this section for loans that became uncollectible, as determined by the school, before January 1, 1983.

(i) A school must request permission to write off an uncollectible loan within 30 days of the determination that it is uncollectible or reimburse the fund in the full amount of the loan, pursuant to § 57.310(b)(4)(iii). The 30-day period for submitting the loan for write-off review begins on the date that the determination of uncollectibility is made, in accordance with paragraph (b)(4) of this section. In any instance where the Secretary determines that a school has failed to exercise due diligence in the collection of a loan, in accordance with the applicable regulatory requirements, the school will be required to place in the fund the full amount of principal, interest, and penalty charges that remains uncollected on the loan. Reimbursement must be made by the following June 30 or December 31, whichever is sooner, except that in no case will a school be required to reimburse the fund in less than 30 days following the Secretary's disapproval of the request for write-off approval.

(ii) If the Secretary determines that a school has exercised due diligence in the collection of a loan, in accordance with the applicable regulatory requirements, or if the school determines that the loan was uncollectible prior to January 1, 1983, the school will be permitted to reduce its accounts receivable for the NSL fund by the full amount of principal, interest, and penalty charges that remains uncollected on that loan and will not be required to return the Federal share of the loss to the Secretary.

(iii) If a school does not request permission to write off an uncollectible loan within the required timeframe, it must reimburse the fund for the full amount of principal, interest, and penalty charges that remains uncollected on that loan. This reimbursement must be made by the following June 30 or December 31, whichever is sooner, except that in no case will a school be required to reimburse the fund in less than 30 days following its determination that a loan is uncollectible.

(iv) Failure to comply with the requirements of this section will subject a school to the noncompliance provisions of § 57.318 and the Department's Claims Collection regulations (45 CFR part 30), as appropriate.

* * * * *

(Approved by the Office of Management and Budget under control number 0915–0138)

[FR Doc. 91–19472 Filed 8–14–91; 8:45 am]

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federal register

Thursday
August 15, 1991

Part IX

The President

Presidential Determination No. 91-28—Presidential Determination on Proposed Agreement Between the United States of America and the Czech and Slovak Federal Republic Concerning Peaceful Uses of Nuclear Energy

Presidential Determination No. 91-29—Presidential Determination on Proposed Agreement Between the United States of America and the Republic of Hungary Concerning Peaceful Uses of Nuclear Energy

Presidential Determination No. 91-47—Determination Under Section 405(a) of the Trade Act of 1974, as Amended—the Union of Soviet Socialist Republics

Thursday
August 15, 1991

Federal Register

Part IX

The President

Presidential Determination No. 91-38—Presidential Determination on Proposed Agreement Between the United States of America and the Czech and Slovak Federal Republic Concerning Peaceful Uses of Nuclear Energy

Presidential Determination No. 91-39—Presidential Determination on Proposed Agreement Between the United States of America and the Republic of Hungary Concerning Peaceful Uses of Nuclear Energy

Presidential Determination No. 91-47—Determination Under Section 402(c) of the Trade Act of 1974, as Amended—the Union of Soviet Socialist Republics

Federal Register

Vol. 56, No. 158

Thursday, August 15, 1991

Presidential Documents

Title 3—

The President

Presidential Determination No. 91-28 of April 16, 1991

Presidential Determination on Proposed Agreement Between the United States of America and the Czech and Slovak Federal Republic Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State and the Secretary of Energy

I have considered the proposed Agreement Between the Government of the United States of America and the Government of the Czech and Slovak Federal Republic on Cooperation in Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.

I have determined that the performance of the agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed agreement and authorize you to arrange for its execution.

THE WHITE HOUSE,
Washington, April 16, 1991.

[FR Doc. 91-19715
Filed 8-14-91; 8:40 am]
Billing code 3195-01-M

Editorial note: For the President's message to Congress of April 16 on signing Presidential Determination No. 91-28, see the *Weekly Compilation of Presidential Documents* (vol. 27, p. 440).

Presidential Documents

Title 3—

The President

Presidential Determination No. 91-28 of April 12, 1991

Presidential Determination on Proposed Agreement Between the United States of America and the Czech and Slovak Federal Republic Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State and the Secretary of Energy

I have considered the proposed Agreement Between the Government of the United States of America and the Government of the Czech and Slovak Federal Republic on Cooperation in Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.

I have determined that the performance of the Agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed agreement and authorize you to arrange for its execution.

THE WHITE HOUSE,
Washington, April 12, 1991.

Presidential Documents

Presidential Determination No. 91-29 of April 16, 1991

Presidential Determination on Proposed Agreement Between the United States of America and the Republic of Hungary Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State and the Secretary of Energy

I have considered the proposed Agreement for Cooperation Between the United States of America and the Republic of Hungary Concerning Peaceful Uses of Nuclear Energy, along with the views, recommendations, and statements of the interested agencies.

I have determined that the performance of the agreement will promote, and will not constitute an unreasonable risk to, the common defense and security. Pursuant to section 123 b. of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2153(b)), I hereby approve the proposed agreement and authorize you to arrange for its execution.

THE WHITE HOUSE,
Washington, April 16, 1991.

[FR Doc. 91-19716
Filed 8-14-91; 9:40 am]
Billing code 3195-01-M

Editorial note: For the President's message to Congress of April 16 on signing Presidential Determination No. 91-29, see the *Weekly Compilation of Presidential Documents* (vol. 27, p. 441).

Presidential Documents

Presidential Determination No. [illegible] of April [illegible], [illegible]

Presidential Determination on Proposed Agreement Between the United States of America and the Republic of Hungary Concerning Peaceful Uses of Nuclear Energy

Memorandum for the Secretary of State and the Secretary of Energy

[illegible]

[illegible]

THE WHITE HOUSE,
Washington, April [illegible].

[illegible]

Presidential Documents

Presidential Determination No. 91–47 of August 2, 1991

Determination Under Section 405(a) of the Trade Act of 1974, as Amended—the Union of Soviet Socialist Republics

Memorandum for the Secretary of State

Pursuant to the authority vested in me under the Trade Act of 1974 (Public Law 93–618, January 3, 1975; 88 Stat. 1978), as amended (the "Trade Act"), I determine, pursuant to section 405(a) of the Trade Act, that the "Agreement on Trade Relations Between the United States of America and the Union of Soviet Socialist Republics" will promote the purposes of the Trade Act and is in the national interest.

You are authorized and directed to transmit copies of this determination to the appropriate Members of Congress and to publish it in the **Federal Register**.

THE WHITE HOUSE,
Washington, August 2, 1991.

[FR Doc. 91–19717
Filed 8–14–91; 9:41 am]
Billing code 3195–01–M

Editorial note: For the President's letter to Congressional leaders of August 2 on signing Presidential Determination No. 91–47, see the *Weekly Compilation of Presidential Documents* (vol. 27, p. 1098).

Reader Aids

Federal Register

Vol. 56, No. 158

Thursday, August 15, 1991

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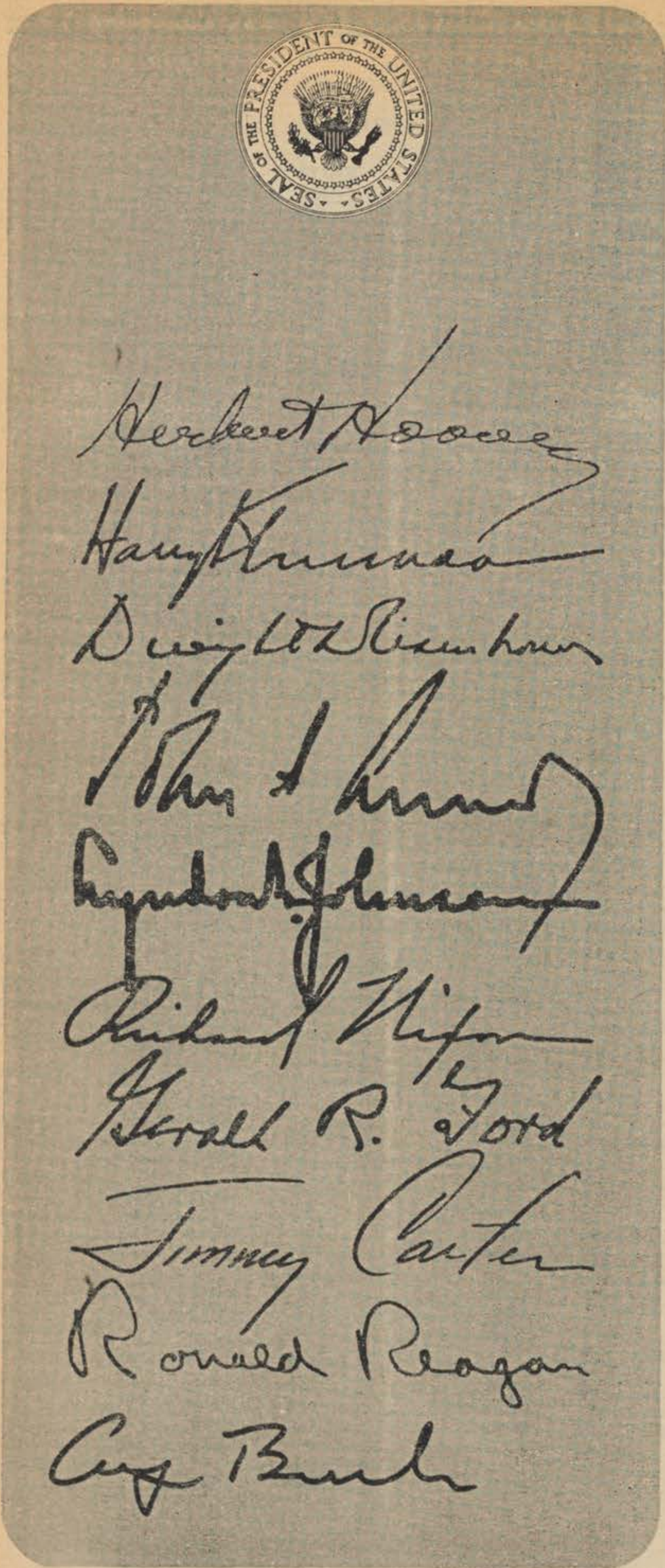
LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List August 9, 1991



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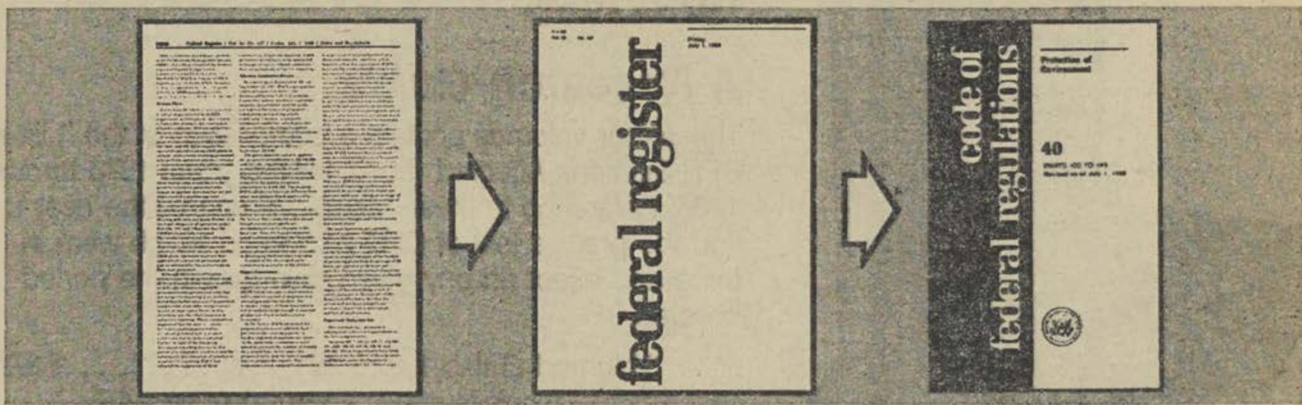

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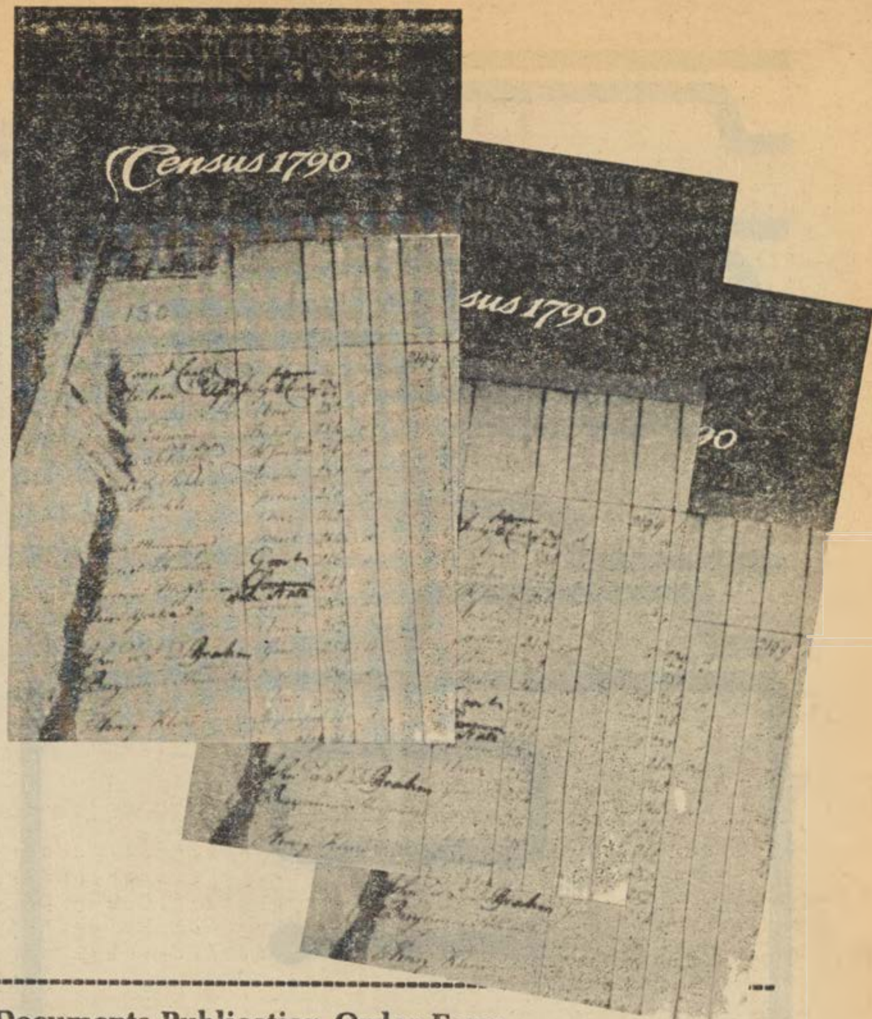

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